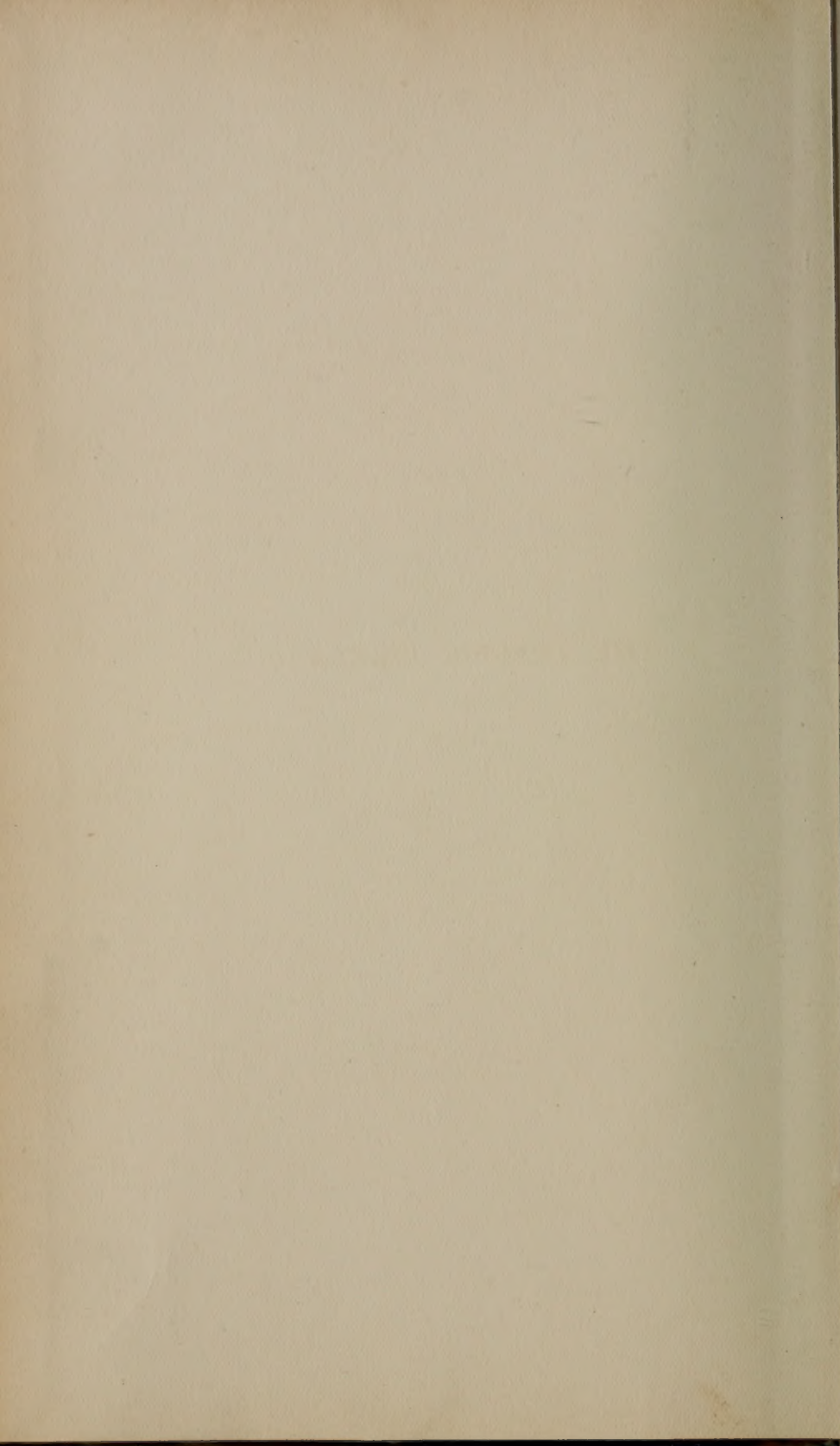


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Interstate Commerce Law

PART III

Act to Regulate Commerce *Administrative Interpretation*

Prepared under the direction of the *Advisory Traffic Council of*
The American Commerce Association

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PREFACE

PART III of "Interstate Commerce Law" brings to ready consummation a completely detailed interpretative analysis of the Act to Regulate Commerce and its amendatory and supplemental acts. This volume also completes the amplification of the remaining sections of the parent regulative statute.

It is evident from the comprehensive analysis of these regulatory laws, as presented in the three parts of "Interstate Commerce Law," that the Interstate Commerce Commission has endeavored to adopt a workable construction of the law and has given full scope to its discretionary powers in reaching its conclusions in matters of importance, not only through exhaustive hearings, but by open conferences and discussions with representative shippers and traffic officials. Such a course is fundamental in any orderly scheme of public regulation.

The administrative constructions of the various provisions of the law have been soundly arrived at and their value for the guidance of both shippers and carriers is unestimable. The judicial views of the laws by the courts have been promptly adopted by the Commission and applied in a harmonious application of the requirements of the regulatory laws, with a view to avoiding unnecessary controversy and to bringing into the clear light of practicability the obscure or ambiguous portions of the commerce statutes, that the obligations of the carriers and the rights of the public may be promptly understood and speedily effected.

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It is the purpose of this treatment of the regulatory laws to develop for full public observance the extraordinary economic value of the regulating system in business life. It has, unfortunately, been true that the substantial and permanent benefits of the Act to Regulate Commerce and its supplementary legislation have been many times indirect and frequently unperceived, even by those who in fact benefited most by their observance. By accurate observance of the shipping detail of these laws, the shipper is enabled to bring under close control a heretofore variable cost in the distribution of his goods and to procure prompt and effective enforcement of his rights in the transportation of his property, as those rights are guaranteed to him by the supreme law of the land.

The administration of the regulatory laws by the Interstate Commerce Commission has been wisely prosecuted by that body with a "knowledge of conditions, of environment, and of transportation relations," and the findings of the Commission are made by law *prima facie* true, the courts having ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Where the courts have interfered at all, unmistakable error has been committed, but it is gratifying to note that these instances have been rare and infrequent.

This volume, therefore, brings to completeness a workable construction of interstate transportation law for the use of those who furnish and those who employ the services of transportation of American railroads.

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- § 9. Circuitous Routes.

CHAPTER I.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DISCRIMINATIONS BETWEEN LOCALITIES.

§ 1. Judicial Construction of the New Fourth Section.

In the **Intermountain Cases** the Supreme Court of the United States declared the meaning of the amended fourth section to be as follows:

"It is certain that the fundamental change which it (the amendment of 1910) makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short-haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property,' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short-haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that, in substance, the amendment intrinsically states no new rule or principle, but simply shifts the power conferred by the section as it originally stood; that is,

it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of reviewing function. In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so in the absence of some authority would not only be inimical to the provisions of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved; and if not, is, in any event, by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections."

U. S. vs. A. T. & S. F. Ry. Co., 234 U. S. 476.
U. S. vs. U. P. R. R. Co., 234 U. S. 495.

Since the Commission has been invested with practically unlimited discretionary power in permitting departures from the technical prohibition of the amended

fourth section, the elements justifying permissive disregard of the section assume important proportions. In the terms of the amended fourth section, no limitation is opposed to the Commission's use of its discretionary power to relieve common carriers from the operation of the section, but it must not be assumed that the Commission will act independently as to this section and without due cognizance of the purposes of the act as a whole, and of the obvious intent of Congress in dividing its own powers with an administrative body created by it. The purpose of Congress was to prevent a certain form of pernicious discrimination—the charging of a greater compensation for transportation for a short than for a long distance over the same line—and at the same time, instead of making the prohibition absolute, to afford a degree of elasticity in the enforcement of the section whereby carriers under certain economic justification might be allowed to charge more for the shorter haul to the intermediate point. That it would have been a difficult matter to define these exceptional cases in the law itself, is clearly apparent, and it is equally obvious that if Congress had left it entirely to the discretion of the Commission, without any definition of the prohibited form of discrimination, the section would be constitutionally defective as a complete delegation of the legislative power of Congress to the Commission, a purely administrative tribunal. The intentions of Congress was clearly stated by the Chairman of the House Committee on Interstate Commerce at the time of the amendment—"Practically what we do here is to give the Commission power to say what, in a particular case, shall be a just and reasonable rate; although we declare as a general proposition that it shall be unjust and unreasonable to charge more for a short haul than for a long haul."

In other words, Congress established a general rule prohibiting a certain form of discrimination which the Commission must adopt in enforcing the section but allowed the Commission to pass upon the economic justness of necessary differentiation in rates in cases of justifiable exceptions to the general rule.

§ 2. Discrimination by Carrier Fostering Industries On Its Line.

It is the duty of a common carrier to receive and carry, upon reasonable terms, all goods tendered in suitable condition, and it can not lawfully discriminate in favor of any person, product, or locality. A common carrier, in order to build up and foster industries on its own lines, can not lawfully refuse to carry the products of like industries located on connecting lines.

Standard Lime & Stone Co. vs. Cumberland Valley R. R. Co., 15 I. C. C. Rep. 620.

Chamber of Com., etc., vs. C. R. I. & P. R. Co., 15 I. C. C. Rep. 460.

Waxelbaum & Co. vs. A. C. L. R. Co., 12 I. C. C. Rep. 183.

Cardiff Coal Co. vs. C. M. & St. P. R. Co., 13 I. C. C. Rep. 460.

The principle is a plain one. A carrier's duty is to serve the whole public and to do this upon reasonable rates and without discrimination. Fundamentally it may not, as a public servant, serve one community at the expense of another or build a rate wall around one point to advance the interests of a competing point. Nor has the Commission ever sanctioned any schedule of rates constructed in pursuance of any such policy or having any such consequences. In the carrier's interest, the Commission has sanctioned some violations of the long-and-short-haul provision of the act. In particular cases it has recognized it as the natural right of a carrier to adjust its rates

on a lower basis than it would otherwise establish, in order to meet competition over other routes and from other quarters and thus secure a traffic that would be lost to it under higher rates. It has sanctioned such adjustments rather in the interest of the carrier than of the shipper. But in no case has the Commission recognized the right of a carrier to fix its rates to or from a given point on a higher lever than they otherwise should be, in order to prevent one community from competing with another, or to keep the products of one community out of a territory, the wants of which may be fully supplied by another community. In the judgment of the Commission the right to adjust rates on any such theory should not rest either in the carriers or in the Commission. The rails of a common carrier form a public highway over which the commerce of any community should be able freely to move on rates that are reasonable, all things considered, regardless of the consequences of its competition upon any other community.

Indianapolis Freight Bu. vs. C. C. C. & St. L. Ry. Co., 26 C. C. Rep. 53, 58, 59.

A carrier is not justified in attempting to restrict traffic to movement on its own line.

Lumber Rates from Texas, Louisiana, and Arkansas, 28 I. C. C. Rep. 471, 474.

Indianapolis Freight Bu. vs. C. C. C. & St. L. Ry. Co., 26 I. C. C. Rep. 53, 58.

See also:

Duncan & Co. vs. N. C. & St. L. Ry. Co., 35 I. C. C. Rep. 477, 483.

Rates on Lumber from Southern Points, 34 I. C. C. Rep. 652, 571.

Chamber of Commerce, Houston, Tex., vs. I. & G. N. Ry. Co., 32 I. C. C. Rep. 247, 280.

Bowling Green Business Men's Assn. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 1, 4.

- Memphis Freight Bureau vs. I. C. R. R. Co., 27 I. C. C. Rep. 1.
- Port Arthur Board of Trade vs. A. & S. Ry. Co., 27 I. C. C. Rep. 388, 402.
- Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 415.
- Commercial Club of Duluth vs. B. & O. R. R. Co., 27 I. C. C. Rep. 639, 652.
- Meridian Fertilizer Factory vs. H. & P. Ry. Co., 26 I. C. C. Rep. 351.
- Wichita Board of Trade vs. S. T. & S. F. Ry. Co., 25 I. C. C. Rep. 625, 631, 632.
- Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17, 24.
- Railroad Commission of Nevada vs. S. P. Co., 21 I. C. C. Rep. 329, 367.
- Receivers' and Shippers' Assn. of Cincinnati vs. C. N. O. & T. P. Ry. Co., 18 I. C. C. Rep. 440, 458.
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- Cedar Hill Coal & Coke Co. vs. A. T. & S. F. Ry. Co., 15 I. C. C. Rep. 73, 77.
- Standard Lime & Stone Co. vs. Cumberland Valley R. R. Co., 15 I. C. C. Rep. 620, 625.
- Greater Des Moines Committee vs. C. Gt. W. Ry. Co., 14 I. C. C. Rep. 294, 297.
- Corn Belt Meat Prods. Assn. vs. C. B. & Q. Ry. Co., 14 I. C. C. Rep. 376, 386.
- Memphis Freight Bu. vs. Ft. S. & W. R. R. Co., 13 I. C. C. Rep. 1, 4.
- Reliance Textile & Dye Works vs. S. Ry. Co., 13 I. C. C. Rep. 48, 54.
- Wagner, Zagelmeyer & Co. vs. Detroit & Mackinac Co., 13 I. C. C. Rep. 160, 165.

§ 3. Base-Point Rates Not Undue Discrimination.

A "base-point" system of rates, consisting of a fixed rate to a certain point to which is added for other local points, the amount of the local rate, or a properly adjusted percentage factor, between the base point and the local point, is not inconsonant with the provisions of the Act to Regulate Commerce. This system of rate construction has been applied in large areas, notably between the Atlantic seaboard and the Mississippi River and in the southeast. The base point system gave effect to the rela-

tive distances of the local points from the competitive or base points, the rate being determined in each case by adding to the through rate to the base point the local rate from that point to the local point, or back to the local point without the actual back haul being performed, in case such combination made less. This system of rates afforded to the local point its proper ratio of proximity to the competitive or base point.

The Commission possesses power to alter or ignore these base points, which are to a certain extent artificial. In some of its earlier cases the Commission condemned this system of rate application as discriminatory and in violation of the Act to Regulate Commerce.

In the Louisville & Nashville case, the Supreme Court of the United States, upon appeal from the circuit court's decree sustaining the finding of the Interstate Commerce Commission which had condemned the base point system as applied to certain local rates basing on Atlanta, Ga., held that the base point system of rate making in the southeast was not in violation of the act and the resulting dissimilarity of circumstances under the application of the system prevented any unjust preference.

I. C. C. vs. L. & N. R. R. Co., 190 U. S. 173, and 47 L. Ed. 1047.

Compare:

L. & N. R. R. Co. vs. I. C. C., 102 Fed. Rep. 709.

The Commission has many times had cause to investigate alleged discriminatory rate relationships in the southeast, under the powers vested in it under the fourth section, not only as that section now stands amended but under its former construction. In its report in **Fourth Section Violations in the Southeast**, 30 I. C. C. Rep. 153, 174, the Commission prescribed a scale of rates on a mile-

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age basis, and which it had arrived at by an averaging of a large number of rates, to be observed as maxima to intermediate points on routes to more distant depressed-rate points. The object in prescribing this scale of rates was to prevent undue discrimination in rates, one as against another, and as compared with the rates to more distant points as to which some relief from the requirements of the long and short haul rule seemed necessary and just. The scale did not represent the Commission's opinion as to what would be reasonable and proper rates to all points in the southeastern territory, but it did represent the average practice of the carriers in that territory in naming rates to intermediate noncompetitive points.

The carriers in the southeast subsequently made further application to the Commission, representing that in their endeavor to check rates in response to this order of the Commission, as well as to various former orders affecting rates to points in the same territory, the restrictions in fourth section's order No. 3866 (30 I. C. C. Rep. 153, 174) had the effect of preventing them from establishing a harmonious and consistent rate adjustment. The Commission corrected such discrepancies as were shown to exist in its mileage scale and authorized the continuance of certain higher rates to intermediate points where competition justified their maintenance, at the same time authorizing certain short roads in the southeast to meet the rates at their junction points established by their trunk line connections, and to continue higher rates to intermediate local points for two years.

Fourth Section's Violations in the Southeast, 32 I. C. C. Rep. 63.

See also:

Board of Trade of Carrollton, Ga., vs. C. of Ga. Ry. Co., 28 I. C. C. Rep. 154.

La Grange Chamber of Commerce vs. A. & W. P. R. R. Co.,
28 I. C. C. Rep. 178.
Board of Trade of Morristown vs. A. C. L. R. R. Co., 24 I.
C. C. Rep. 372.

Since these several orders by the Commission read-adjusting the rates of the southeast under the requirements of the new fourth section of the act, the basing point system of rates in that territory has undergone such radical changes as to no longer exist as a rate-making method of any extent. In fact, it now represents a "base line" adjustment of rates rather than a basing point system of rates. The basing point system of rates in the southeast as it existed prior to its present revision, was unique in its structural effects. General basing points have existed for years at strategic transportation points throughout the country, and upon which great regional rate structures have been constructed, but the system of rates employed in the southeast was one which preserved a differential relationship in the rates maintained between competitive and noncompetitive southeastern points.

The Supreme Court seemed so well impressed with the Commission's view of base point rate applications in the Burnham, Hanna & Munger case that in its opinion, reviewing the order of the circuit court, it quoted from the report of the Commission as follows:

"Nor did the Commission ignore or underestimate the manner in which the lines of railroads had been extended or the system of rates or rate making which had resulted. That is the system of making rates upon certain basing lines or points. Rates 'break' at such points, it was proved as a result of building independent lines westward. In other words, lines of railroads were built to certain cities from the East, seeking such cities, it may be, because of their natural situation and facilities, and other independent lines building westward, each line fixing its own rates

or uniting according to circumstances in joint rates. It is the observance of such points that give and maintain, as we understand the contention of the railroads, to certain cities 'the equal opportunity in the distribution of merchandise with the merchants in the East, and with the merchants to the West of said cities, so far as their business is affected by trade rates.' That this was carefully considered is manifest, for the Commission resisted the argument which was made against basing rates on such points, saying:

"We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of rate making has been suggested as a substitute for it, except one based upon the postage stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs that have been builded upon the system of rate-making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth and manufacturing or producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and point of large consumption.'

"It was the sense of the Commission, however, that such points could not be immovable forever and fixed forever against power of changing, or that through rates based on such points must be exempt from

regulation, no matter what their character, or be constituted at the will of the railroad of the sum of local rates or the sum of rates from one basing point to another, however unjust the rates might be. * * *

"That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his."

I. C. C. vs. C. R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946.

Burnham, etc., vs. C. R. I. & P. Ry. Co., 14 I. C. C. Rep. 312.

See also:

E. T. V. & G. R. Co. vs. I. C. C., 181 U. S. 1.

Columbia Gro. Co. vs. L. & N. R. R. Co., 18 I. C. C. Rep. 502.

Avery Mfg. Co. vs. A. T. & S. F. Ry. Co., 16 I. C. C. Rep. 120.

Indianapolis Freight Bureau vs. C. C. C. & St. L. Ry. Co., 16 I. C. C. Rep. 56.

Ozark Fruit Growers' Assn. vs. St. L. & S. F. R. R. Co., 16 I. C. C. Rep. 134.

Maricopa County Commercial Club vs. Wells Fargo & Co., 16 I. C. C. Rep. 182.

Indianapolis Freight Bureau vs. C. C. C. & St. L. Ry. Co., 16 I. C. C. Rep. 254.

The distinction should be drawn between the application of the base point system of rates which may create unlawful discriminations under the provisions of section 3, where no long-and-short-haul relationship of rates is involved, and the application which results in unlawful discriminations under the provisions of section 4 because of greater charges to the short distant point than to the farther distant point.

The Missouri River case (14 I. C. C. Rep. 312) was brought under the provisions of section 3, whereas the discriminations alleged as a result of the basing point system in the southeast were under the fourth section of the Act.

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§ 4. Group Rates.

The system of group-rate making was early recognized by the Commission as a proper one except where certain shippers or consignees were really damaged by the rates thus applied while others were correspondingly benefited. The Commission has consistently refrained from breaking up a rate group where it had not been made to appear that the aggrieved party was actually damaged by the discrimination resulting from the group rate.

Imperial Coal Co. vs. P. & L. E. R. R. Co., 2 I. C. C. Rep. 618.

Howell vs. N. Y. L. E. & W. R. Co., 2 I. C. C. Rep. 272.

Milk Producers' Assn vs. D. L. & W. R. R. Co., 7 I. C. C. Rep. 92.

See also:

Newport Mining Co. vs. C. & N. W. Ry. Co., 33 I. C. C. Rep. 646, 657.

While the group or zone point of rate making is often of mutual advantage to shippers and carriers and will not ordinarily be disturbed by the Commission where the rates are reasonable and nondiscriminatory, nevertheless the relative situation of contiguous points may not be wholly disregarded in rate making without incurring the risk of unjust discrimination or undue advantage to favored points. Carriers may lawfully make rates applicable to group points within a defined zone and treat all points in one group as a single point for rate basing purposes but the position of points just within or without the zone line cannot be disregarded when the question of through rates to the latter points is to be determined for discrimination.

Hammerschmidt & Frazen vs. C. & N. W. Ry. Co., 30 I. C. C. Rep. 71, 81.

A group system of rates is never free from inequality

of rates when distance alone is considered as between points on extreme sides of the group. The determination of undue discrimination in group rates must be from the facts in each case. In most instances the discrimination between the near and far edges of a group is not undue.

In all rate groups there must of necessity be a more or less abrupt "rate hump" between the nearest and most distant points in the group, and when rates are made under the group or blanket system, the distance principle must be modified. A carrier should not force upon shippers in one locality a system of group rates while preferring some in the same locality with rates on raw material.

The Commission will not approve a blanket rate which imposes unreasonable or unjustly discriminatory burdens upon any points in the group, but where transportation conditions are similar, competitive shippers in the same general territory should be similarly grouped with regard to rates. In fact, carriers have followed the principle that whenever distance between certain points constitutes a relatively small percentage of distance between any of those points and ultimate market, such originating points should be grouped for rate-making purposes.

Rates on News Print Paper, 26 I. C. C. Rep. 13, 19.

Nor, however logical may be the geographical boundary of a group, discriminatory rates must not be given to any point.

Consolidated Fuel Co. vs. A. T. & S. F. Ry. Co., 27 I. C. C. Rep. 554, 557, 558.

In re Advances on Sugar, 27 I. C. C. Rep. 122, 124.

Texas Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 508, 509.

Waukesha Lime & Stone Co. vs. C. M. & St. P. Ry. Co., 26 I. C. C. Rep. 515, 519.

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- Switzer Lumber Co. vs. K. C. S. Ry. Co., 25 I. C. C. Rep. 611, 612.
Southwestern Missouri Millers' Club vs. M. K. & T. Ry. Co., 22 I. C. C. Rep. 422, 424.
Saginaw Board of Trade vs. Grand Trunk Ry. Co., 17 I. C. C. Rep. 169, 173.

See also:

- Lebanon Commercial Club vs. L. & A. R. R. Co., 28 I. C. C. Rep. 301.
Betcher Lumber Co. vs. C. M. & St. P. Ry. Co., 26 I. C. C. Rep. 335.
Santa Rosa Traffic Assn. vs. S. P. Co., 24 I. C. C. Rep. 46.
Thropp vs. P. R. R. Co., 23 I. C. C. Rep. 497, 498, 499.
Traggott Schmidt & Sons vs. M. C. R. R. Co., 23 I. C. C. Rep. 684.
Stiritz vs. N. O. M. & C. R. R. Co., 22 I. C. C. Rep. 578, 581.
Ferguson Saw Mill Co. vs. St. L. I. M. & S. Ry. Co., 18 I. C. C. Rep. 391.
Indianapolis Freight Bureau vs. C. C. C. & St. L. Ry. Co., 15 I. C. C. Rep. 504, 513.
Nebraska State Ry. Comm. vs. U. P. R. R. Co., 13 I. C. C. Rep. 349, 355.
Rhineland Paper Co. vs. N. P. R. R. Co., 13 I. C. C. Rep. 633, 634, 637.

A carrier can not lawfully group its mines with respect to rates so as to unduly discriminate against any locality. The duty imposed by law is to give equal treatment to all shippers who are in a position to demand it, and this includes the right to reach competitive markets on relatively equal terms.

Carriers are not required by law, and could not in justice be required, to equalize natural disadvantages, such as location, cost of production, and the like. Where, however, the same carrier serves two districts which, by their location, the character of their output, and distance from markets where their product must be disposed of are in substantially similar circumstances and conditions, the serving carrier can not lawfully prefer one to the other in any manner whatsoever.

- Black Mountain Coal Land Co. vs. So. Ry. Co., 15 I. C. C. Rep. 286, 292 (1909).

A system of blanket rates from a producing section is fair and just, as such, to all parties concerned, although it necessarily involves rates that are somewhat high for the distance from points on the edge of the blanket nearest the points of destination, but in making such an adjustment the burden rests upon the carrier to provide rates that shall not be unreasonable from any point of origin.

It is the well established rule that undue prejudice or preference may not be said to exist as between shippers or communities unless the same carrier serves them or participates in their traffic and the transportation conditions are shown to be substantially similar. The construction by a carrier of a system of rates on a zone or blanket plan is not sufficient to justify the collection of unreasonable charges to any point in such zone or blanket and a particular point or locality may not lawfully be subjected to high freight charges merely because the carriers, for convenience or otherwise, include it with a number of other points in a defined territory, which latter points are not similarly situated.

Corporation Commission, etc., vs. N. & W. Ry. Co., 19 I. C. C. Rep. 303.

Compare:

Suffern Grain Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 128, 182.
Davenport Commer. Club vs. Y. & M. V. R. R. Co., 20 I. C. C. Rep. 19, 20.

A group rate for a particular district upon a commodity for which a large demand exists, and intended to place the producers in the district upon an equality among themselves and with the producers of the same commodity from other districts, all competing in a common market, is not unlawful merely because of differences in the geographical location of different producers and their re-

spective distances from the market. Actual undue preference or advantage, of which the rate is the cause, must result to the more favorably situated producers to render a group rate unlawful.

In all group rate systems there is an inequality of rates when distance alone is considered as between points on one side of a group and those on the other side. Hence, group rates must result in a certain amount of discrimination, but such rates are not for this reason alone necessarily unlawful, since the discrimination may not be undue. Certainly, however, the carrier, in the construction of such groups, is under a strong obligation to cause as little discrimination as possible.

Okla. Cottonseed Crushers' Assn. vs. M. K. & T. Ry. Co., 35 I. C. C. Rep. 94, 108.

Newport Mining Co. vs. C. & N. W. Ry. Co., 33 I. C. C. Rep. 645, 657.

Wis. & Ark. Lumber Co. vs. St. L. I. M. & S. Ry. Co., 33 I. C. C. Rep. 33, 43.

Public Utilities Commission of the State of Idaho vs. O. S. L. R. R. Co., 33 I. C. C. Rep. 103, 108.

Anson, Gilkey & Hurd Co. vs. S. P. Co., 33 I. C. C. Rep. 332, 333, 342.

Chamb. of Commerce of Houston, Texas vs. I. & G. N. Ry. Co., 32 I. C. C. Rep. 247, 252.

Chamb. of Commerce of Houston, Texas, vs. I. & G. N. Ry. Co., 32 I. C. C. Rep. 247, 252.

Rates on Sugar, 31 I. C. C. Rep. 495, 510.

Stock & Sons vs. L. S. & M. S. Ry. Co., 31 I. C. C. Rep. 150, 153.

Colonial Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 573.

Kaufman Commercial Club vs. T. & N. O. R. R. Co., 31 I. C. C. Rep. 167, 172.

Pardee Works vs. C. R. R. of N. J., 29 I. C. C. Rep. 500, 503.

Springfield Commercial Assn. of Springfield, Ill., vs. P. R. R. Co., 28 I. C. C. Rep. 511, 514.

Lebanon Commercial Club vs. L. & N. R. R. Co., 28 I. C. C. Rep. 301, 304.

Texarkana Freight Bureau vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 569, 583.

In re Advances on Sugar, 27 I. C. C. Rep. 122, 124.

Consolidated Fuel Co. vs. A. T. & S. F. Ry. Co., 27 I. C. C. Rep. 554, 559.

Betcher Lumber Co. vs. C. M. & St. P. Ry. Co., 26 I. C. C. Rep. 335, 340.

- Texas Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 508, 510.
Waukesha Lime & Stone Co. vs. C. M. & St. P. Ry. Co., 26 I. C. C. Rep. 515, 519.
Texas Common Point Case, 26 I. C. C. Rep. 528, 538.
Santa Rosa Traffic Assn. vs. S. P. Co., 24 I. C. C. Rep. 46, 49.
Monroe Progressive League vs. St. L. I. M. & S. Ry. Co., 15 I. C. C. Rep. 534, 542.
Dallas Freight Bureau vs. M. K. & T. Ry. Co., 12 I. C. C. Rep. 427, 434.

In the following cases, the Commission's attitude toward the Texas Common Point territory, prior to its recent decision in the Dallas-Ft. Worth Case (Dallas Chamber of Commerce, vs. A. T. & S. F. Ry. Co., 40 I. C. C. Rep. 619) will be found fully explained:

- Iron Ore Rate Cases, 41 I. C. C. Rep. 181.
Dallas-Ft. Worth Case, 40 I. C. C. Rep. 619.
Pardee Iron Works vs. C. R. R. of N. J., 39 I. C. C. Rep. 162, 165.
Memphis Freight Bureau vs. St. L. I. M. & S. Ry. Co., 39 I. C. C. Rep. 224, 244.
Eastern Oregon Lumber Producers' Assn. vs. C. B. & Q. R. R. Co., 39 I. C. C. Rep. 316, 320.
Goldcamp Mill Co. vs. N. & W. Ry. Co., 39 I. C. C. Rep. 433, 444.
Brush Creek Mining & Mfg. Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 449, 458.
Stonoga Coke & Coal Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 523, 552.
Major Stave Co. vs. M. D. & G. R. R. Co., 39 I. C. C. Rep. 573, 579.
City of Astoria vs. S. P. & S. Ry. Co., 38 I. C. C. Rep. 16.
Decker & Sons vs. M. & St. L. R. R. Co., 38 I. C. C. Rep. 228.
Bonners Ferry Lumber Co. vs. G. N. Ry. Co., 38 I. C. C. Rep. 268, 275.
National Dock & Storage Warehouse Co. vs. B. & M. R. R. Co., 38 I. C. C. Rep. 643, 657.
Pitt Gas Coal Co. vs. P. R. R. Co., 37 I. C. C. Rep. 240, 243.
Bituminous Coal Rates to Southeast, 37 I. C. C. Rep. 652.
Paducah Board of Trade vs. A. & S. Ry. Co., 37 I. C. C. Rep. 760, 767.
Chamber of Commerce of Houston, Texas, vs. H. E. & W. T. Ry. Co., 32 I. C. C. Rep. 203.
Texas Common Point Case, 26 I. C. C. Rep. 528, 538.
R. R. Commission of Texas vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 463, 485.
Williams Co. vs. V. S. & P. Ry. Co., 16 I. C. C. Rep. 482.
Dallas Freight Bureau vs. M. K. & T. Ry. Co., 12 I. C. C. Rep. 427, 434.

§ 5. Discriminations Between Localities.

All wrongful discriminations between localities are not confined to violations of the inhibition of section 4 of the Act to Regulate Commerce. In fact that section prohibits but one specific form of discrimination between localities, i. e., where the charge to the less distant point exceeds the charge to the more distant point in the same route. Circumstances and conditions at different points of necessity vary and it is not always an unjust discrimination to allow to shippers at one point certain advantages over those at another point. Such advantages may exist in the form of particular services rendered at the one point and not at the other. The Act to Regulate Commerce "does not attempt to equalize fortune, opportunities or abilities." Thus, it has been held that a free cartage service may, for competitive reasons, be furnished at one point and not at another, or a proper charge made for the carriage of oil barrels, where the producer of oil shipped in barrels rather than in tank cars, and not constitute unjust discrimination as against a producer at another point who shipped in tank cars.

Unjust discrimination may or may not be present in the granting of certain privileges or services at one point and not at another, such as different rates on manufactured and unmanufactured articles, differences in car service, rates on carrier's company material compared with open rates, differences in demurrage charges applicable to private and line cars, differences in transit charges and privileges, lighterage allowances, track and terminal facilities, classification of property, wharfage rights and facilities, etc.

I. C. R. R. Co. vs. DeFuentes (La. R. R.), 236 U. S. 157.

G. T. Ry. Co. vs. Michigan R. R. Com., 231 U. S. 457, 58 L. Ed. 310.

United States vs. B. & O. R. R. Co., 231 U. S. 274, 58 L. Ed. 218.

- Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S. 304, 57 L. Ed. 1594.
Mitchell Coal Co. vs. Pa. R. R. Co., 230 U. S. 247, 57 L. Ed. 1472.
Pa. R. R. Co. vs. Internat'l Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446.
I. C. C. vs. B. & O. R. R. Co., 225 U. S. 326, 56 L. Ed. 1107.
Proctor & Gamble vs. U. S., 225 U. S. 282, 56 L. Ed. 1091.
I. C. C. vs. Dittenbaugh, 222 U. S. 42, 56 L. Ed. 83.
Robinson vs. B. & O. R. R. Co., 222 U. S. 506, 56 L. Ed. 288.
Union Pac. Ry. Co. vs. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171.
So. Pac. Terminal Co. vs. I. C. C., 219 U. S. 498, 55 L. Ed. 310.
B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292.
I. C. C. vs. I. C. R. R. Co., 215 U. S. 452, 54 L. Ed. 280.
I. C. C. vs. Stickney, 215 U. S. 98, 54 L. Ed. 112.
So. Ry. Co. vs. St. Louis Hay & Grain Co., 214 U. S. 297, 57 L. Ed. 1004.
L. & N. R. Co. vs. Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441.
I. C. C. vs. C. G. W. Ry. Co., 209 U. S. 108, 52 L. Ed. 705.
Penn. Refining Co. vs. W. N. Y. & P. R. R. Co., 208 U. S., 52 L. Ed. 456.
C. H. & D. Ry. Co. vs. I. C. C., 206 U. S. 142, 51 L. Ed. 995.
N. Y., N. H. & H. R. R. Co. vs. I. C. C., 200 U. S. 361, 50 L. Ed. 515.
So. Pac. Co. vs. I. C. C., 200 U. S. 536, 50 L. Ed. 585.
Central Stock Yards Co. vs. L. & N. R. R. Co., 192 U. S. 568, 48 L. Ed. 565.
I. C. C. vs. Wisc., Detroit, Gd. H. & Milw. Ry. Co., 167 U. S. 633, 42 L. Ed. 310.

This class of discriminations, when unjust in their effect, fall within the inhibition of section 3 of the Act and are matters within the discretion of the Interstate Commerce Commission which may determine whether such services or privileges are proper or whether, under the circumstances of each case, constitute an unjust discrimination or undue preference.

Unjust discriminations are sometimes created by the conflict between national and state regulating systems. A state may prohibit any unjust discrimination by an intrastate or domestic railroad in any locality upon its lines or may empower its railroad commission to determine whether rates fixed by such roads are discriminatory.

On the other hand the action of the state may result in rendering an interstate rate or practice unduly discriminatory. Congress did not undertake to authorize the Interstate Commerce Commission to prescribe interstate rates and thus effect a unified control by the exercise of the rate-making power over both descriptions of traffic. But the powers conferred by the Act are not limited where interstate commerce itself is involved, for when the Commission finds that an unjust discrimination against interstate trade exists by reason of the relations of intrastate and interstate rates, such a matter is one with which the national Commission alone is competent to deal. In view of the aim of the Act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that such subject was thus left without governmental regulation.

Several notable decisions have been made by the national Commission, involving unjustly discriminatory rates between certain localities occasioned by the peculiarities of state-made rates in the same general territory. In the **Shreveport, Memphis, St. Louis Business Men's Association, South Dakota Express Rate** cases and others, the Commission has required the removal of the unjust discrimination affected by state action through readjustment of the interstate rate.

The Shreveport cases offer the best illustration of the Commission's authority to deal with discriminations and preferences occasioned by the action of a state in its regulation of railroad rates. These cases involved an order of the Commission requiring the carriers to remove a discrimination against Shreveport, La., which resulted from the act of the carriers in charging higher rates, according to distance, on interstate traffic from Shreveport than on

intrastate traffic from Dallas to Houston, Tex., to destination points in Texas.

The state legislature of Louisiana directed its railroad commission to bring proceedings before the national Commission to accomplish two purposes: **First**, to secure an adjustment of rates that would be just and reasonable from Shreveport into Texas; and **second**, to end, if possible, the alleged unjust discrimination practiced by these interstate carriers in favor of Texas state traffic and against similar traffic between Louisiana and Texas.

The alleged discrimination in a general sense is best described by the Commission in its original report:

"The railroads deny that the rates out of Shreveport are unreasonable, but place their defense mainly upon the proposition that they are compelled by the railroad commission of Texas to effect the discrimination here involved. * * * There appears to be little question as to the policy of the Texas commission. It is frankly one of protection to its own industries and communities. * * * Passing, then, to the question of discrimination, has this Commission the power to say that whatever rates an interstate carrier makes between points in Texas shall not be exceeded for the same distance under like conditions between Shreveport and Texas points? In other words, may a carrier engaged in interstate commerce discriminate against a city beyond the border of a state by imposing upon that city's traffic rates which deny its shippers access upon equal terms to the communities of an adjoining state?

"This is an appeal to the powers lodged in this Commission under the third section of the act—that provision which is aimed at the destruction of undue preference and advantage. We thus meet directly the most delicate problem arising under our dual system of government. Congress asserts its exclusive dominion over interstate commerce; the state asserts its

absolute control over state commerce. The state for its own purposes establishes rates designed to protect its own communities and promote the development of its own industries. These rates are adopted by the interstate carriers upon state traffic, but are not adopted upon interstate traffic. Thus arises a discrimination in favor of communities within the state, and interstate commerce suffers a corresponding disadvantage. May this Commission end such discrimination by saying to the interstate carrier, 'You may not distinguish between state and interstate traffic transported under similar conditions. If the rates prescribed for you by state authority are not compensatory upon this specific traffic as to which discrimination is found, the burden rests upon you, irrespective of your obligation to the state, to so adjust your rates that justice will be done between communities, regardless of the invisible state line which divides them'? To which we are compelled to answer that the effective exercise of its power regarding interstate commerce makes necessary the assertion of the supreme authority of the National Government, and that the Congress has appropriately exercised this power in the provisions of the act to regulate commerce touching discrimination."

La. R. R. Co. vs. H. E. & W. T. R. R. Co., 23 I. C. C. Rep. 31.

The finding of the Commission was that the interstate class rates from Shreveport to the Texas points were unreasonably high, and it prescribed maximum class rates to be substituted therefor, such prescribed rates being substantially the same as the class rates fixed by the Railroad Commission of Texas and applied by the carriers on traffic in Texas for similar distances. The Commission also directed the carriers to desist from charging higher rates for the transportation of any commodity from Shreveport toward Dallas and Houston, respectively, and

intermediate points than were contemporaneously charged for the carriage of such commodity from Dallas to Houston toward Shreveport for equal distances.

A petition was filed by the carriers in the Commerce Court (which court has since been abolished) to annul the Commission's order, but subsequently the order as to class rates was put in force by the carriers and the attack in the Commerce Court was continued upon that portion of the order which prohibited higher commodity rates from Shreveport into Texas than those charged for eastbound traffic of the same commodities from Dallas and Houston, respectively, for equal distances.

The constitutional question was raised in the Commerce Court. It was charged that Congress was impotent to control the intrastate charges of an interstate carrier even to prevent unjust discrimination against interstate traffic, and that if it be assumed that Congress has this power, still it has not been exercised or delegated to the national Commission, and hence the action of the Commission exceeded the limits of authority which had been conferred upon it.

T. & P. Ry. Co. vs. U. S., 205 Fed. Rep. 380, 382, 385.

The carriers took an appeal from the Commerce Court to the Supreme Court of the United States. This latter court described the situation substantially as follows:

"Shreveport, La., is about 40 miles from the Texas state line and 231 miles from Houston, Tex., on the line of the Houston, East & West Texas and Houston and Shreveport companies (which are affiliated in interest); it is 189 miles from Dallas, Tex., on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to dis-

tance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first-class rate from Houston to Lufkin, Tex., 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, 69 cents. The rate on wagons from Dallas to Marshall, Tex., 147.7 miles was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Tex., 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment."

The holding of the Supreme Court was that the power to deal with the relation between intrastate and interstate rates lies exclusively with Congress and in the exercise of that power Congress can remove, directly or through the aid of a subordinate body, a discrimination arising from the relation of intrastate and interstate rates.

The court called attention to the provisions of section 3 of the Act to Regulate Commerce making unlawful undue or unreasonable prejudice or disadvantage and the provision of section 1 to the effect that the Act to Regulate Commerce shall not apply to commerce wholly within one state, and held that the Commission was authorized and empowered to deal with the situation before it in these cases.

In the course of an exhaustive opinion, the Supreme Court said:

"This language (of section 3) is certainly sweeping enough to embrace all the discriminations of the

sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the Act that the evil of discrimination was the principle thing aimed at, and there is no basis for the contention that Congress intended to exempt any interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it: 'The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations' * * *

"Congress thus (by the proviso of section 1) defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the authority of the states or of the agencies created by the states. This was the question recently decided by this court in the *Minnesota Rate Cases*, *supra*. * * * The present question, however, was reserved, the court saying (230 U. S. p. 419): 'It is urged that the words of the proviso' (referring to the proviso above mentioned) 'are susceptible of a construction which would permit the provisions of section three of the Act, prohibiting carriers from giving an undue or unreason-

able preference or advantage to any locality, to apply to unreasonable discriminations between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the Act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts.'

"Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the Act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the Act. Such a matter is one with which Congress alone is competent to deal, and in view of the aim of the Act and the comprehensive terms of the provisions against unjust discrimi-

ation, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the Commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.

"The further objection is made that the prohibition of section three is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. *East Tennessee, etc., Ry. Co. vs. Interstate Commerce Commission*, 181 U. S. 1, 18, 45 L. Ed. 719, 21 Sup. Ct. 516. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not un-

mindful of the gravity of the question that is presented when state and federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes, must control."

H. E. & W. T. R. R. Co. vs. U. S., 234 U. S. 342, 58 L. Ed. 1341.

On June 17, 1915, the Commission made a supplemental report and order, **Railroad Commissioners of Louisiana vs. St. L. S. W. Ry. Co.**, 34 I. C. C. 472. This order, which applied to many carriers not parties to the original proceeding, required among other things, that all the carriers named therein should establish and maintain from Shreveport to points in what was defined as "eastern Texas," and from those points toward Shreveport, class rates no higher than a certain mileage scale there found reasonable. This scale was based on the Texas class scale up to its maximum of 245 miles, and beyond on the Texas-Oklahoma scale to 400 miles. The order also required the carriers there defendant to cease and desist from charging, demanding, collecting, or receiving rates for the transportation of any commodity from Shreveport to destinations in eastern Texas higher than those contemporaneously applied to the transportation of such commodity for an equal distance from points in eastern Texas toward Shreveport, or higher, distance considered, than the corresponding class rates named in the order. In order to remove what was found to be unjust discrimination the carriers were further required to establish, maintain, and apply to the transportation of traffic from points in eastern Texas toward Shreveport, the provisions of the

current Western Classification in effect at the time the traffic moved.

This supplemental order of the Commission was thereafter followed by five applications to the Commission by interested parties representing various cities, commercial organizations and industries in the State of Texas seeking relief from the order. The Commission several times suspended the taking effect of the tariffs issued in compliance with its supplemental order, and on July 7, 1916, after consolidation of the five proceedings by agreement of counsel for all interested parties, the Commission entered its order in "**Railroad Commission of Louisiana vs. A. H. T. Ry. Co.**, 41 I. C. C. Rep. 83," disposing of the entire proceedings.

The issues in the consolidated cases, as set forth in the Commission's report, were:

"(1) The Reasonableness of defendants' class and commodity rates between Shreveport and points in Texas; (2) whether or not such class and commodity rates are unduly prejudicial to Shreveport as compared with rates maintained by defendants for the transportation of like property for similar distances within the state of Texas; and (3) whether or not the application of the provisions of the western classification to the transportation of property between Shreveport and points in Texas while contemporaneously applying the provisions of the Texas classification to the transportation of like property within the State of Texas results in undue prejudice to Shreveport."

The evidence in the consolidated cases showed striking discrepancies between rates for transportation between Shreveport and Texas points on the one hand and those for similar transportation within the State of Texas on the other.

Briefly, the Commission found that the class rates and rates on certain specified commodities between Shreveport and points in Texas were unreasonable, and unduly prejudicial to Shreveport as compared with similar rates for like distances in Texas; and that the application to the transportation of property within Texas of classification rules different from and minimum carload weights lower than those applicable to transportation of like property between Shreveport and Texas point was unduly prejudicial to Shreveport. Reasonable maximum rates between Shreveport and Texas points were prescribed and the undue prejudices found to exist was ordered removed, the order becoming effective November 1, 1916. Upon the evidence adduced at this second rehearing the Commission modified in some respects the scale previously prescribed as maximum. The modifications so made were principally with regard to rates for short distances and were largely due to the showing made respecting terminal expenses, as set forth in the report.

For many years Texas has been divided, with respect to traffic moving on class rates, into "common-point territory" and "differential territory." To the former it has been the practice to state class rates on a mileage basis, blanketed beyond 245 miles. To points in the latter, rates are constructed by adding to the common-point rates what are known as differentials. This situation was created by the carriers.

In prescribing just and reasonable rates to points in western Texas it became necessary for the Commission to prescribe rates between Shreveport and points in differential territory. The Commission does not lightly disrupt an adjustment of long standing, presumably suited to the needs of the territory affected, in the absence of evidence that the system is no longer necessary or works

unjust discrimination. No objection to the differential territory system was made at the hearing. Accordingly in prescribing just and reasonable class rates as maxima between Shreveport and points in Texas, the Commission recognized existing conditions and prescribed maximum rates between Shreveport and points in common-point territory, with maximum differentials, graduated with the length of the haul, and based largely upon the Texas differential scale, for the transportation between Shreveport and points in differential territory.

The Commission's position with regard to its duties and powers in such cases as these is clearly set forth in the following excerpt from its report of July 7, 1916, in the **Shreveport case**, *supra*:

"It may be regarded as established beyond any possibility of doubt that the present relationship of rates and the difference in classifications has been and is now unduly prejudicial to Shreveport and operates to unduly restrict the trade and commerce of that city. The only excuse for this apparent and admitted discrimination against Shreveport is the claim of the carriers that the intrastate rates in Texas are under the control of the Texas Railroad Commission and that the carriers are powerless to increase them except by permission of that body.

"The power and authority of this Commission to make such order in a case of this kind as may be necessary to remove any unlawful discrimination now existing against interstate traffic has been fully sustained by the Supreme Court of the United States in **Houston & Texas Ry. v. United States**, *supra*. In that case the court said:

'Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule,

for otherwise Congress would be denied the exercise of its constitutional authority and the state and not the nation would be supreme within the national field.'

"If the sole issue were whether or not the present adjustment of class and commodity rates between Shreveport and points in Texas is unduly prejudicial to Shreveport, it would be competent for us, if we found that complainants had sustained their allegation, to make an order requiring defendants to remove such undue prejudice. In the absence of other requirements by federal or state authorities, such an order could be complied with by increasing the Texas rates to the level of the interstate rates, or by reducing the interstate rates to the intrastate basis.

"Should the latter alternative be adopted, either voluntarily or under compulsion of the state authorities, the intrastate rates and regulations would be given extraterritorial force and would become the standard for interstate commerce. The effect of adopting such a plan would not stop with Shreveport. Alexandria and Monroe, La., Vicksburg, Miss., and other points are in competition with Shreveport for trade and commerce to and from Texas and, so far as we are advised, there is no more reason for extending the Texas rates and classification to Shreveport than to other points in Louisiana or other states east of the Mississippi River.

"It can easily be conceived that if carriers, in removing undue prejudice against interstate commerce, were bound to follow the standard set by the state authorities, interstate rates, based in part on the requirements of one state and in part on those of others, would soon be in inextricable and intolerable confusion, productive of discord, and ruinous alike to shippers and carriers. This the commerce clause of the Constitution, under which the Congress has created this Commission and vested it with power, was designed to prevent.

"In this proceeding the allegation of undue prejudice is not the sole issue. Defendants' class rates and many of their commodity rates are attacked as unjust and unreasonable.

"It is perhaps unnecessary to say that the findings and conclusions of state commissions respecting the reasonableness of intrastate rates should be given great weight, that rates established in accordance with such findings should not lightly be disturbed and that we consider it our duty to cooperate in every proper way with the state authorities.

"But the obligation placed upon us by the law requires us to exercise our best judgment upon the facts placed before us and in a case such as this, to prescribe just and reasonable maximum rates and enter such order as shall prevent or remove undue prejudice to interstate commerce, even though in some instances such action may incidentally affect the level of intrastate rates."

In its annual report for 1916 the Commission makes these timely observations relating to the practical administrative problems which arise in cases like the **Shreveport case**, *supra*.

"Turning now to the practical administrative problems which the principles of the **Shreveport Case** present, we venture to submit certain considerations which in our judgment deserve to be kept in view when amendments to the act are contemplated.

"We call to mind once more the fact that previously noted, that this Commission has not reached out in a spirit of aggression to lay its hands on situations involving the principles of the **Shreveport Case**. While we have decided over 50 of such cases and more are being presented to us from time to time, we have dealt with them in the regular line of official duty. In all instances the complaints were filed by sovereign states, municipalities, public administrative authorities, private associations of business

men, corporations, and individuals, parties who had a legal right to do so. We handle and dispose of these cases in the same manner as all other cases, in accordance with law and in obedience to our official oath. Were we to look about for opportunities to apply the principles of the *Shreveport Case*, we could find them in every part of the United States, and we have been requested in several instances to institute investigations upon our own initiative with a view to removing unjust discriminations in such cases just as we have proceeded in scores of other instances on our own initiative to apply remedies which the law provides.

"Generally speaking, such situations represent rate questions and economic problems rather than legal controversies and constitutional issues. While we are fully sensible of the vital principles of constitutional and statutory law which are inherent in certain aspects of such situations, we believe that every such case can, as a practical matter, be disposed of without challenge of these principles of government. In fact, controversies over constitutional limitations of powers and statutory grounds of authority tend to obscure the real elements of the rate problems presented and in which the public is primarily interested in these cases. The vital question is, 'What is the nature of the problem, and through what agencies and by what methods can that problem best be solved in the interest of the whole public?'

"The question is therefore presented how most effectively to bring into relief the mountains and the valleys of these interstate problems, so that they may be dealt with in a just and lawful manner. The situations requiring adjustment present two rates, one state and the other interstate, the one higher or lower than the other, applicable on the same commodity for transportation by the same carrier under substantially similar circumstances and conditions. Assuming both of these rates which give rise to the controversy to lie within the zone of reasonableness,

an assumption which is not always warranted by the facts, the difference between them creates the unjust discrimination and the undue preference or advantage which we are called upon to remove. The single point within the zone of reasonableness which represents the reasonable rate is, therefore, the point to be sought. In the Shreveport Case proper, the history of which has been recited above, we had the assistance of the authorities of only one of the states concerned in addition to counsel for interested parties. In other cases, involving the same principles, we have had the active cooperation of the respective state commissions. This cooperation was entirely voluntary and without status under the act to regulate commerce, except in so far as the respective state commissions acted in the capacity of interested parties of record.

"Viewing the entire situation as it has been depicted in proceedings before us, affecting widely scattered localities and territories throughout the United States, we believe that without abdication any of the federal authority to finally control questions affecting interstate and foreign commerce we should be authorized to cooperate with state commissions in efforts to reconcile upon a single record the conflict between the state and the interstate rates. We believe that procedure like this, the legislative details of which we deem it unnecessary at this time to attempt to define, together with the other amendments recommended by us, or still to be brought to the attention of Congress through the joint congressional investigating committee, will go far to meet the requirements of the rate situation as it is presented in this country to-day.

"In a great and growing country like this economic changes follow one another in rapid succession. The act to regulate commerce has been, and doubtless must continue to be, amended from time to time to meet these changes. Future needs, the indications of some of which are now discernible, can be met by

future amendments when the times so require. We make these latter observations simply to guard against the possible impression that what we are proposing is thought by us to be more permanent than the character of the industrial and social life in which it is to be initiated."

I. C. C. Ann. Rep. 1916.

I. C. C. Ann. Rep. 1914.

See also:

Traffic Bureau Sioux City Com'l Club vs. American Express Co., 39 I. C. C. Rep. 703, 719, 722.

Virginia Carolina Chemical Co. vs. S. A. L. Ry. Co., 39 I. C. C. Rep. 660.

Stonaga Coke & Coal Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 523, 541.

Memphis Freight Bureau vs. St. L. I. M. & S. Ry. Co., 39 I. C. C. Rep. 303, 311.

City of Memphis vs. C. R. I. & P. Ry. Co., 39 I. C. C. Rep. 256, 263, 265, 267, 273.

Texarkana Freight Bureau vs. I. C. R. R. Co., 38 I. C. C. Rep. 55, 58, 60.

Through Rates to Points in Louisiana and Texas, 38 I. C. C. Rep. 153, 163, 164.

Royster-Guano Co. vs. A. C. L. R. R. Co., 38 I. C. C. Rep. 190, 192, 193.

McCaull-Dinsmore Co. vs. N. P. Ry. Co., 38 I. C. C. Rep. 305, 306.

Omaha Alfalfa Milling Co. vs. U. P. R. R. Co., 38 I. C. C. Rep. 351.

Class and Commodity Rates between St. Louis, East St. Louis and Ohio River Points, 38 I. C. C. Rep. 411, 418.

Vandenboom-Stimson Lumber Co. vs. St. L. I. M. & S. Ry. Co., 38 I. C. C. Rep. 432, 439.

LaCrosse Shippers' Assn. vs. C. & N. W. Ry. Co., 38 I. C. C. Rep. 453, 455, 456, 459, 460.

Holmes & Hollowell Co. vs. G. N. Ry. Co., 37 I. C. C. Rep. 627, 632, 635, 641, 647.

Class Rates between Stations in Louisiana, 33 I. C. C. Rep. 302, 304.

Rhineland Paper Co. vs. M. St. P. & S. S. M. Ry. Co., 31 I. C. C. Rep. 555.

Columbia Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 570.

Pac. Coast Gypsum Co. vs. O.-W. R. R. & N. Co., 30 I. C. C. Rep. 135, 139.

Oklahoma Portland Cement Co. vs. M. K. & T. Ry. Co., 27 I. C. C. Rep. 101, 104.

Cement Rates from Penn. to New Jersey, 26 I. C. C. Rep. 687, 688.

Rates on Hay from the Northwest, 25 I. C. C. Rep. 680, 684.
Southern Shippers' Traffic Assn. vs. A. T. & S. F. Ry. Co.,
24 I. C. C. Rep. 570, 584.

R. R. Commission of La. vs. St. L. S. W. Ry. Co., 23 I. C. C.
Rep. 31, 41.

Compare:

Western Passenger Fares, 37 I. C. C. Rep. 1, 41, 42.
1915 Western Rate Advance Case, Part II, 37 I. C. C. Rep.
114, 163.
Andy's Ridge Coal Co. vs. So. Ry. Co., 18 I. C. C. Rep. 405,
407.
Saunders & Co. vs. Southern Express Co., 18 I. C. C. Rep.
415, 422.

Sections 3 and 4 of the Act to Regulate Commerce bear an assential relationship in giving certainty to the statutes' intent not to prohibit all differences between localities, but only such as are undue or unreasonable. It is not mere disparity in rates that the law forbids. It is the undue and unreasonable preference or advantage of one locality over another that is forbidden by Section 3, and that a greater charge shall not be made for a shorter than for a longer distance under substantially similar circumstances and conditions. While the latter phrase is now stricken from the statute, its effect as determinative of discrimination between localities is as potent as ever. Says the Supreme Court:

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

E. Tenn., etc., R. Co. vs. I. C. C. 181 U. S. 1, 18, 45 L. Ed.
719.

§ 6. Geographical Advantages or Disadvantages.

If a city is large and prosperous by virtue of natural advantages it may justly be given the benefit of its location, even though that may result in apparent discrimination against smaller intermediate points; but the mere fact that a market is important and a large consumer is not of itself this kind of a natural advantage. One important purpose of the act to regulate commerce was to stop discrimination against the weak, whether individual or locality. While market competition must always be considered, and while it may alone in some cases, perhaps, justify the granting of relief under the fourth section, the Commission does not feel that it does in all cases.

Fourth Section Applications, 24 I. C. C. Rep. 192, 194.

Failure, however, to overcome natural disadvantages is not undue prejudice. Thus, a carrier, in its capacity as a public utility, may not serve one locality or community at the cost of another, nor may it build a rate wall around one point to advance the interests of a competing point, for the Commission has never recognized the right of a carrier to fix its rates to or from a given point on a higher level than they otherwise should be, in order to prevent one community from competing with another, or to keep the products of one community out of a territory, the wants of which may be fully supplied by another community, and the right to adjust rates on any such theory should not rest either in the carriers or in the Commission.

Port Arthur Board of Trade vs. A. & S. Ry. Co., 27 I. C. C. Rep. 388, 402.

Indianapolis Freight Bu. vs. C. C. C. & St. L. Ry. Co., 26 I. C. C. Rep. 53, 58.

See also:

- Lumber Rates from Texas, Louisiana and Arkansas, 28 I. C. C. Rep. 471, 474.
Memphis Freight Bu. vs. I. C. R. R. Co., 27 I. C. C. Rep. 1, 3.
Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 415.
Commercial Club of Duluth vs. B. & O. R. R. Co., 27 I. C. C. Rep. 639, 652.
Meridian Fertilizer Factory vs. H. & P. Ry. Co., 26 I. C. C. Rep. 351.

Natural advantages of location, such as nearness to producing fields, can not of themselves deprive shippers of the right to reasonable rates on their products, independent of all other considerations. It is not the province of the Commission to equalize by rate adjustments, natural conditions or to destroy legitimate commercial advantages enjoyed by one section or locality.

Enterprise Mfg. Co. vs. Ga. R. Co., 12 I. C. C. Rep. 451, 456.

See also:

- Enterprise Mfg. Co. vs. Ga. R. R. Co., 12 I. C. C. Rep. 130.
Japan Trading Co. vs. Ga. R. R. Co., 12 I. C. C. Rep. 236.

The Commission early in its official life laid the restraint upon carriers that they might not disregard distances and natural advantages for the purpose of bringing about commercial equality.

Coml. Club, etc. vs. C. R. I. & P. R. Co., 6 I. C. C. Rep. 647.

And prior to this ruling, the Commission had declared that manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their advantageous location in respect of cost of raw material supplied from a common source, or of the distance to the common market for the finished product.

James & Abbot vs. Can. Pac. R. Co., 4 I. C. Rep. 274.

See also:

Chamber of Commerce vs. G. N. R. Co., 4 I. C. C. Rep. 230, where the Commission held that carriers were not justified in making rates on grain to competing towns which destroyed the advantage of a milling town possessing great natural, acquired and improved advantages for the carrying on of the grain industry. (Followed in Valley Flour Mills vs. Atchison, etc., R. Co., 16 I. C. C. Rep. 73.)

See also:

N. Y. Prod. Exchg. vs. B. & O. R. R. Co., 7 I. C. C. Rep. 613, 658.
 Wilmington Tariff Assn. vs. Cinn., etc., R. Co., 9 I. C. C. Rep. 118, 157.
 Bd. of Trade, etc. vs. O. D. S. S. Co., 6 I. C. C. Rep. 632, 645.
 Eau Claire Bd. of Trade vs. Chicago, etc., R. Co., 5 I. C. C. Rep. 264, 294, 4 I. C. Rep. 65, 78.
 Acme Cement Plaster Co. vs. Chicago G. W. R. Co., 18 I. C. C. Rep. 19.
 Cent. Yellow Pine Assn. vs. Vicksburg, etc., R. Co., 10 I. C. C. Rep. 193, 201.
 R. R. Comrs. of Fla. vs. S. A. L. R. Co., 16 I. C. C. Rep. 1.

In the Payne-Gardner case the Commission said:

“Advantages of location, such as proximity to a navigable stream or strong competition between carriers, naturally result in lower rates to a town so situated, and it is not the province of the Commission to disturb the resulting rate relations unless the discrepancy is so great as to effect an unjust discrimination against the noncompetitive point. But the mere fact that a given town has been recognized as a trade center, and is enabled by its more favorable rate adjustment to distribute in a certain territory, can not justify the continuance of relative rates which result in undue preference. The law contemplates relatively fair rates as between different places, and the dealer located in a small town is entitled to a reasonable adjustment which will enable him to compete on an equitable basis with dealers at trade centers enjoying the benefit of competitive rates.”

Payne-Gardner Co. vs. L. & N. R. R. Co., 13 I. C. C. Rep. 638, 643.

Compare:

National League of Com. Merchants of the United States vs. A. C. L. R. Co., 20 I. C. C. Rep. 132, 134, where, under a charge that on shipments of vegetables and garden truck from S. C. points to Buffalo and Pittsburgh, these two points were at a disadvantage with Rochester, N. Y., the Commission held that inasmuch as there were practically no shipments to Rochester, N. Y., the competition was inconsiderable, and therefore the comparison of the localities unavailing.

See also:

Asparagus Grwrs. Assn. vs. A. C. L. R. R. Co., 17 I. C. C. Rep. 243, and
Fla. Frt. & Veg. Shprs' Protective Assn. vs. A. C. L. R. R. Co., 17 I. C. C. Rep. 552.

In the case of Quimby vs. Me. Cent. R. R. Co., 13 I. C. C. Rep. 246, where the complainants' alleged their inability, on account of their location, to take advantage of milling-in-transit privilege extended to their competitors at Bangor and Lewiston, Me., and a consequent discrimination against them in favor of those who could take advantage of the privilege, the Commission held that the disadvantage complained of by the complainants was primarily due to their unfavorable location, and called attention to the fact that it has repeatedly held that it is not the province of the Commission to overcome disadvantages of this nature by adjustment of transportation charges. (Citing Squire & Co. vs. M. C. R. R. Co., 4 I. C. C. Rep. 611.)

When it appears that a favored point secures an advantage over complaining cities by reason of a privilege not compelled by competition, there being no dissimilarity of conditions, a showing of the rate situation is as convincing a showing of a violation of section 3 as it is generally practical to make.

Duncan & Co. vs. N. C. & St. L. Ry. Co., 35 I. C. C. Rep. 477, 483.

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See also:

- Memphis Freight Bureau vs. St. L. I. M. & S. Ry. Co., 39 I. C. C. Rep. 303, 309.
- Goldcamp Mill Co. vs. N. & W. Ry. Co., 39 I. C. C. Rep. 433.
- Concordia Commer. Club. vs. A. T. & S. F. Ry. Co., 39 I. C. C., Rep. 675, 687.
- Wyeth Hardware Co. vs. A. T. & S. F. Ry. Co., 39 I. C. C. Rep. 697.
- Traffic Bureau of the Sioux City Commercial Club vs. American Exp. Co., 39 I. C. C. Rep. 703.
- New Orleans-Texas Rates, 38 I. C. C. Rep. 1, 9.
- Corp. Comm. of Okla. vs. A. T. & S. F. Ry. Co., 38 I. C. C. Rep. 33, 34.
- Official Classification Rates on Paper, 38 I. C. C. Rep. 120.
- Decker & Sons vs. M. & St. L. R. R. Co., 38 I. C. C. Rep. 228, 230.
- Cottonseed Products to Pt. Arthur, Tex., 38 I. C. C. Rep. 378, 386.
- Okla. Traffic Assn. vs. A. T. & S. F. Ry. Co., 38 I. C. C. Rep. 392, 394.
- Bitumen. Coal Rates to the Southeast, 37 I. C. C. Rep. 652, 658.
- Anson, Gilkey & Hurd Co. vs. S. P. Co., 33 I. C. C. Rep. 332, 338.
- Milburn Wagon Co. vs. A. A. R. R. Co., 32 I. C. C. Rep. 582.
- Wisconsin Coal Co. vs. P. M. R. R. Co., 28 I. C. C. Rep. 645.
- Sheridan Chamb. of Commerce, vs. C. B. & Q. R. R. Co., 28 I. C. C. Rep. 250, 262.
- Gottron Bros. vs. G. & W. R. R. Co., 28 I. C. C. Rep. 38.
- Board of Trade of Carrollton, Ga., vs. Cent. of Ga. Ry. Co., 28 I. C. C. Rep. 154.
- Columbia Chamb. of Commerce vs. So. Ry. Co., 28 I. C. C. Rep. 339, 347.
- Chamb. of Commerce of New York vs. N. Y. C. & H. R. R. Co., 27 I. C. C. Rep. 238, 244.
- Pt. Arthur Board of Trade vs. A. & S. Ry. Co., 27 I. C. C. Rep. 388, 402.
- Escanaba Business Men's Assn. vs. A. A. R. R. Co., 24 I. C. C. Rep. 11.
- Holland Blow Stave Co. vs. A. C. L. R. R. Co., 24 I. C. C. Rep. 81. (Rehearing and previous order set aside in 27 I. C. C. Rep. 488, 492.)
- Rates on Salt, 24 I. C. C. 192, 196.
- Bowling Green Business Men's Protective Assn. vs. L. & N. R. R. Co., 24 I. C. C. Rep. 228, 243.
- Slider vs. So. Ry. Co., 24 I. C. C. Rep. 312.
- Chamb. of Commerce of Newport News, Va., vs. So. Ry. Co., 23 I. C. C. Rep. 345, 352.
- So. Calif Sugar Co. vs. S. P. L. A. & S. L. R. R. Co., 19 I. C. C. Rep. 6, 11.
- Wilson Prod. Co. vs. P. R. R. Co., 16 I. C. C. Rep. 116, 122.
- Cedar Hill Coal & Coke Co. vs. A. T. & S. F. Ry. Co., 15 I. C. C. Rep. 73, 78.

- Memphis Frt. Bureau vs. Ft. S. & W. R. R. Co., 13 I. C. C. Rep. 1, 4.
Wagner, Zagelmeyer & Co. vs. D. & M. Ry. Co., 13 I. C. C. Rep. 160, 166.

The mere fact that a city is prosperous does not deprive it of its right to have rates that are not unduly discriminatory in favor of other cities, for commercial and economic conditions can not be made the basis of unjust discrimination. Competitive cities are entitled to retain such particular rates as they have by reason of their geographical location, their industry and thrift. And, on the other hand, failure by the carriers to overcome geographical disadvantages is not undue prejudice.

- Board of Trade of Carrollton, Ga., vs. C. of Ga. Ry. Co., 28 I. C. C. Rep. 154, 167.
Columbia Chamber of Commerce vs. S. Ry. Co., 28 I. C. C. Rep. 339, 347.
Port Arthur Board of Trade vs. A. & S. Ry. Co., 27 I. C. C. Rep. 388, 402.

Nor the fact that a city is recognized as a commercial center is no reason for giving it unduly preferential rates.

- Bowling Green Business Men's Assn. vs. L. & N. R. R. Co., 24 I. C. C. Rep. 228, 239.

A carrier may not voluntarily disregard comparatively similar differences in distances where to do so will result in unjust discrimination between cities.

- Commercial Club of Superior, Wis. vs. G. N. Ry. Co., 24 I. C. C. Rep. 96, 116.

§ 7. Fostering Carrier's Own Territory.

A carrier's duty is to serve the whole public and to do this upon reasonable rates and without discrimination. Fundamentally it may not, as a public servant, serve one community at the expense of another or build a rate wall around one point to advance the interests of a compet-

ing point. Nor has the Commission ever sanctioned any schedule of rates constructed in pursuance of any such policy or having any such consequences. In the carrier's interest it has sanctioned some violations of the long-and-short-haul provision of the Act. In particular cases it has recognized it as the natural right of a carrier to adjust its rates on a lower basis than it would otherwise establish, in order to meet competition over other routes and from other quarters and thus secure a traffic that would be lost to it under higher rates. The Commission has sanctioned such adjustments rather in the interest of the carrier than of the shipper. But in no case has the Commission recognized the right of a carrier to fix its rates to or from a given point on a higher level than they otherwise should be, in order to prevent one community from competing with another, or to keep the products of one community out of a territory, the wants of which may be fully supplied by another community. It is the judgment of the Commission that the right to adjust rates on any such theory should not rest either in the carriers or in the Commission. The rails of a common carrier form a public highway over which the commerce of any community should be able freely to move on rates that are reasonable, all things considered, regardless of the consequences of its competition upon any other community.

Indianapolis Frt. Bureau vs. C. C. C. & St. L. Ry. Co., 26 I. C. C. Rep. 53, 58.

See also:

Commercial Club of Joplin, Mo. vs. Mo. Pac. Ry. Co., 32 I. C. C. Rep. 226, 232.

Worn vs. B. & L. R. R. Co., 32 I. C. C. Rep. 58.

Oklahoma Portland Cement Co. vs. A. L. & G. Ry. Co., 32 I. C. C. Rep. 221.

Lumber Rates from Texas, Louisiana and Arkansas, 28 I. C. C. Rep. 471, 474.

- Port Arthur Board of Trade vs. A. & S. Ry. Co., 27 I. C. C. Rep. 403, 415.
- Commercial Club of Duluth vs. B. & O. R. R. Co., 27 I. C. C. Rep. 639, 652.
- Memphis Freight Bureau vs. I. C. R. R. Co., 27 I. C. C. Rep. 1.
- Meridian Fertilizer Factory vs. T. & P. Ry. Co., 26 I. C. C. Rep. 351.
- Wichita Board of Trade vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 625, 631.
- Railroad Commission of Nevada vs. S. P. Co., 21 I. C. C. Rep. 329, 367.
- Cedar Hill Coal & Coke Co. vs. C. & S. Ry. Co., 17 I. C. C. Rep. 479.
- Wilson Produce Co. vs. Pa. R. R. Co., 16 I. C. C. Rep. 116, 122.
- Duncan & Co. vs. N. C. & St. L. Ry. Co., 16 I. C. C. Rep. 590, 595.
- Delray Salt Co. vs. C. St. P. M. & O. Ry. Co., 16 I. C. C. Rep. 507, 511.
- Cedar Hill Coal & Coke Co. vs. A. T. & S. F. Ry. Co., 15 I. C. C. Rep. 73, 77.
- Chamber of Commerce of Milwaukee vs. C. R. I. & P. Ry. Co., 15 I. C. C. Rep. 460.
- Standard Lime & Stone Co. vs. C. V. R. R. Co., 15 I. C. C. Rep. 620, 625.
- Corn Belt Meat Producers' Assn. vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 376, 386.
- Cardiff Coal Co. vs. C. M. & St. P. Ry. Co., 13 I. C. C. Rep. 460.

Compare:

- City of Astoria vs. S. P. & S. Ry. Co., 38 I. C. C. Rep. 16, 24.
Holding that the mere maintenance of higher rates to one point than to another is not an unjust discrimination; it is only when general conditions of transportation and the general circumstances of surrounding traffic are substantially similar and such a rate relationship adversely affects the commerce of one point and thereby materially benefits the commerce of the other point that it may be said to involve the preferences and discriminations prohibited by law as between different communities served by the same carriers.
- Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17, 24.
- Receivers & Shippers' Assn. of Cincinnati vs. C. N. O. & T. P. Ry. Co., 18 I. C. C. Rep. 440, 458.
- Reliance Textile & Dye Works vs. So. Ry. Co., 13 I. C. C. Rep. 48, 54.
- Wagner, Zagelmeyer & Co. vs. Detroit & Mackinac Ry. Co., 13 I. C. C. Rep. 160, 165.

§ 8. Long and Short Hauls.

The principle change in the fourth section of the Act to Regulate Commerce resulting from the amendment of 1910 is to the effect that carriers may not upon their own initiative, and before determination by the Commission upon proper application, deviate from the long-and-short-rule of the section. This simply means that under the present law the carriers must first have a determination of the question by the Commission upon its merits, whereas prior to the amendment of 1910 they could act upon their own judgment and initiative, their action being subject to subsequent investigation and determination by the Commission. There is nothing to be found in the amendment of 1910, or elsewhere in the Act, which justifies the Commission in permitting the establishment, or after full hearing, the continuance of a rate unreasonable under the first section or unduly discriminatory under the third or fourth sections.

Rates on Boots and Shoes from Boston, Mass., 31 I. C. C. Rep. 154, 157.

In 1910 Congress incorporated the following provision in the fourth section of the Act to Regulate Commerce:

“Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.”

This amendment, by its express terms, applies only to rates thereafter reduced to meet water competition. The condition precedent to the application of the provision against allowing the rail rates to be increased is “when-

ever a carrier by rail shall, in competition with a water route or routes, reduce the rates," not whenever a carrier by rail has, in competition with a water route reduced the rates.

In the **Transcontinental Commodity Rates** case, 32 I. C. C. Rep. 449, 453, it was urged that competition "for trade" must exist before any unjust discrimination can result.

Speaking to this issue, the Commission said:

"This contention must be rejected for the reasons stated in the **Santa Rosa case**. It is a foregone conclusion that competition between jobbing houses and factories for trade can not exist without the jobbing houses and factories and, if a certain adjustment of freight rates prevents one town from securing the jobbing houses and factories in competition with another, a situation is presented which the Act to Regulate Commerce was designed to correct. The rule is therefore laid down that when the question of freight rates enters into the competition of cities and towns in any respect whatsoever, whether that competition is one for trade, factories, or people, complaints alleging unjust discrimination will be entertained by the Commission."

See also:

Intermountain Rate Cases, 234 U. S. 476.
Transcontinental Commodity Rates, 40 I. C. C. Rep. 35.
Westbound Lake-and-Rail Knit Goods Commodity Rates, 32 I. C. C. Rep. 54.
Santa Rosa Traffic Assn. vs. S. P. Co., 29 I. C. C. Rep. 65.
New Pittsburgh Coal Co. vs. H. V. Ry. Co., 26 I. C. C. Rep. 121, 125.
Santa Rosa Traffic Assn. vs. S. P. Co., 24 I. C. C. Rep. 46.
R. R. Comm. of Nevada vs. S. P. Co., 19 I. C. C. Rep. 238.

Compare:

Pig Iron Rates from Va. to Penna., 27 I. C. C. Rep. 343, 345.
Amer. Insulated Wire & Cable Co. vs. C. & N. W. Ry. Co., 26 I. C. C. Rep. 415, 416.

The Commission, since the amendment of the section in 1910, has been possessed of discretionary power to permit, under justifying circumstances, departures from the strict letter of the fourth section and since such justifying circumstances result from conditions created by competition for trade, factories, and people, reference is made to the subsequent chapters and sections on "Competition."

The filing of an application by a carrier for relief from section 4 of the Act does not preclude a determination of the complaint under section 3, for a point may be unduly preferred for reasons other than those covered by section 4.

In the **Tifton case**, the Commission said:

"Neither the absence nor presence of competition by carriers alone, nor the extent of its operation measured solely by their financial interests, can be relied on to adjust rates reasonable and just to all. There may be effectual means foreign to local traffic conditions for curbing competition at one point and not at another. One carrier may deem lower rates just and due to a given point and desire to put them in, and yet be restrained because of the power of retaliation or the threat of rate changes by a rival carrier at some other point detrimental to the former carrier. The necessary result of the theory set up in defense of these rates would be to allow the carriers to create and shape the conditions to justify their rates. They could, among other things, restrain competition at one place by agreement or otherwise and not do so at another, and that, too, independent of equal facilities for competition in carrying at both."

Mayor and Council of Boston, Ga., vs. A. C. L. R. R. Co.,
24 I. C. C. Rep. 50, 53.

Mayor and Council of Tifton vs. L. & N. R. R. Co., 9 I.
C. C. Rep. 181.

See also:

Board of Trade of Dawson vs. C. of Ga. Ry. Co., 8 I. C. C. Rep. 192.

§ 9. Circuitous Routes.

The Commission has held in disposing of fourth section applications that ordinarily a line or route is circuitous if it exceeds the direct line in mileage by not less than 15 per cent. The Commission does not hold, however, that this rule should be made one of universal application in disposing of fourth section applications involving rates of freight. It is possible that other elements besides mere distance should be considered and that the disabilities of a particular line might be such as would justify the higher intermediate charge even though the distance were no greater. The 15 per cent rule would hold where the conditions under which all the lines were constructed were substantially the same.

Fourth Section Applications, 24 I. C. C. Rep. 192, 195.

See also:

City of Charlotte, N. C., vs. So. Ry. Co., 34 I. C. C. Rep. 128, 134.

Proportional Class Rates to Iowa Points, 34 I. C. C. Rep. 278, 280.

Fourth Section Violations in the Southeast, 32 I. C. C. Rep. 61, 67.

Commodity Rates to Pac. Coast Terms, 32 I. C. C. Rep. 611, 629.

Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 336.

Alton Board of Trade vs. C. & A. R. R. Co., 28 I. C. C. Rep. 589, 593.

Iowa-Minnesota Cement Rates, 28 I. C. C. Rep. 477, 482.

Natl. Refrigerator & Butchers' Supply Co. vs. St. L. I. M. & S. Ry. Co., 26 I. C. C. Rep. 524, 527.

Edwards & Bradford Lbr. Co. vs. C. B. & Q. R. R. Co., 25 I. C. C. Rep. 93, 96.

McCullough vs. L. & N. R. R. Co., 25 I. C. C. Rep. 48, 49.

In re Lumber Rates, 25 I. C. C. Rep. 50, 51.

In re Southern Railway Co., 25 I. C. C. Rep. 407, 410.

In re Rates on Salt, 24 I. C. C. Rep. 192, 195.

CHAPTER II.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DISCRIMINATIONS BETWEEN LOCALITIES (CONTINUED).

- § 1. Competition (General).
- § 2. Market Competition.
 - (1) Controlling Competition.
- § 3. Creating Artificial Market Conditions.
- § 4. Railroad Competition.
- § 5. Special Commodity Rates as Form of Railroad Competition.
- § 6. Short Line Competition.
- § 7. Water Competition.
- § 8. Transcontinental Rates.
- § 9. Historical Review of Water Competition Influences on Transcontinental Rate Structures.
- § 10. Local Rates in Excess of Divisions of Joint Rates Between Same Points.
- § 11. Express Services.
- § 12. Size or Importance of Town or City no Justification for Discrimination on Preference.
- § 13. Effect of Merger of Two Communities into One Municipality.

CHAPTER II.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DISCRIMINATIONS BETWEEN LOCALITIES (CONTINUED).

§ 1. Competition (General).

Competition, in its many ramifications, is an essential factor in the adjustment of interstate rates. It is often necessary, on account of competitive conditions, to recognize the justice of charging more for a service at one point where all the conditions except that of competition are similar, than for a like service at another place where no competition exists, but it can not be held to be just to so fix rates or charges as to destroy the business of one concern and create a monopoly in favor of other concerns even though it be merely incidental to meeting competitive rates.

Therefore, a carrier should not charge a higher milling-in-transit rate at a point discriminated against than contemporaneously charged at a favored point.

If two carriers serve the same destination from two different points of origin, neither can be held to discriminate against industries at that destination because it seems fit to reduce a rate lower than is inherently reasonable.

Rates, presumptively reasonable in themselves, may discriminate between various destinations because of competitive conditions. A rate to a shorter-distance point

may be rendered higher, by reason of competition, than the rate to a farther-distance point and not be unlawfully discriminatory. But all the other elements of reasonableness or unreasonableness must be carefully considered. As an example, between westbound transcontinental rates via rail lines and those carrying similar traffic via water lines, there is no compelling competition which affects directly the rail rates at Santa Barbara as compared with other Pacific coast cities in California; hence, neither the rail or water rates are unlawfully discriminatory.

Railway competition may, although not necessarily, justify a preference to a particular locality. But where a discrimination against a locality is based upon such competition, which in theory justifies the discrimination, it is always a question of fact under the third section of the Act whether such discrimination is undue or unreasonable, and which must be determined from the particular facts and circumstances of each case.

- T. & P. R. R. Co. vs. I. C. C., 162 U. S. 197, 40 L. Ed. 840.
 I. C. C. vs. Ala. Mid. R. Co., 168 U. S. 144, 40 L. Ed. 414.
 N. Y. Prod. Exchg. vs. B. & O. R. R. Co., 7 I. C. C. Rep. 612.
 Phillips, Bailey & Co. vs. I. & N. R. Co., 8 I. C. C. Rep. 93.
 Grain Shippers' Assn. vs. I. C. R. R. Co., 9 I. C. C. Rep. 158, 177.
 Payne-Gardner Co. vs. L. & N. R. R. Co., 13 I. C. C. Rep. 638, 643.
 Randolph Lbr. Co. vs. S. A. L. R. Co., 13 I. C. C. Rep. 601.
 L. & N. R. Co. vs. Behlmer, 175 U. S. 648, 44 L. Ed. 309.
 I. C. C. vs. L. & N. R. R. Co., 190 U. S. 273, 23 Sup. Ct. 687.
 Harwell vs. Columbus, etc., R. Co., 1 I. C. C. Rep. 236, 248, 1 I. C. Rep. 631, 636.
 Raworth vs. N. P. R. Co., 5 I. C. C. Rep. 234, 246, 3 I. C. Rep. 857.
 Re Cotton Rates, etc., 8 I. C. C. Rep. 121, 124.

Rates are not necessarily proved unjust, unreasonable, or unjustly discriminatory by a mere showing that shipper can not successfully compete as a jobber in certain territory.

- Lindsay & Co. vs. Northern Ex. Co., 33 I. C. C. Rep. 394, 396.

Nor does competition between distributing markets constitute a justification for maintenance of lower rates to a more distant point than to an intermediate point.

Cullman Commercial Club vs. L. & W. R. R. Co., 33 I. C. C. Rep. 634, 637.

So a charge of undue discrimination can not be predicated merely upon conditions which result from controlling competition.

Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 10.

But, when the question of freight rates enters into the competition of cities and towns in any respect whatsoever, whether that competition is one for trade, factories or people, complaints alleging unjust discrimination will be entertained by Commission. It is the view of the Commission that the maximum of public benefit from the fourth section will result from the enforcement of conditions that will tend to promote, and not to diminish or retard competition.

Transcontinental Commodity Rates, 32 I. C. C. Rep. 449, 454.
Commodity Rates to Pacific Coast Terminals, 32 I. C. C. Rep. 611, 629.

When rates are attacked as unduly prejudicial and an equalization of rates is requested, it should be shown that transportation conditions in localities compared are substantially similar.

Chamber of Commerce, Houston, Tex., vs. I. & G. N. Ry. Co., 32 I. C. C. Rep. 247.

But the Commission has also ruled that it can not see the justification for increasing rates which have long been established and which are not claimed to be unremuner-

ative, simply to remove a discrimination caused by advancing rates at competitive points.

Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 520.

Competition may create dissimilarity of circumstances and conditions contemplated under section 4 of the Act, but mere competition between carriers will not legalize a rebate or device by which carriers may charge different rates to different shippers under the same circumstances of transportation, in violation of the provisions of section 2 of the Act.

Wight vs. U. S., 167 U. S. 512, 42 L. Ed. 258.

The Supreme Court has insistently held that carriers may, in fixing their own rates, take into account competition with other carriers, "provided only that the competition is genuine and not a pretense."

I. C. C. vs. C. G. W. Ry. Co., 209 U. S. 108, 52 L. Ed. 705.

It is real and substantial competition which exercises so potential an influence on rates at a given point that the dissimilarity of condition, necessary for relief from section 4, is created. The lesser rate to the more distant point must depend upon the actual existence of competition and not upon its future possibilities. Instead of a mere potential or conjectural state of competition, it must be a controlling competition and not the result of the machinations or agreement of carriers. "If by agreements or combinations among carriers it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive points."

Summarily stated, the only justification for the greater charge for the lesser distance is the dissimilarity of condition created by actual and not potential competition. It must be borne in mind, however, that the right to make the lesser charge to the farther distant point "is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it."

I. C. C. vs. L. & N. R. R. Co., 190 U. S. 273, 47 L. Ed. 1047.
Fuller on Interstate Commerce, section 3, page 203.

In the **Chattanooga case**, the Supreme Court, addressing its attention to issue of dissimilarity of condition, said:

"Taking into view the terms of the order (of the Interstate Commerce Commission) and the reasons given by the Commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the Act to regulate commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate commerce, the dissimilarity of circumstances and conditions provided in the fourth section could not be produced by such competition unless the previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstances and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance unless the assent of the Commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions pre-

scribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the Commission. In other words, that the dissimilarity of circumstances and conditions became a factor in consequence of an act of grace or of a discretion flowing from or exercised by the Commission. This logical result of the construction of the statute adopted by the Commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the Commission found as a fact that the competition at Nashville was of such a preponderating nature that the carrier must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga or to abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic unless they applied to the Commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nashville. But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates, produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and conditions pointed out by the statute which relieves from the long and short haul clause arises from the command of the statute and not from the assent of the Commission; the law, and not the discretion of the Commission, determining the rights of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action was predicated was wrong. Texas and Pacific Railway

Co. vs. Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission vs. Alabama Midland Railroad Co., 168 U. S. 144 and 164, 42 L. Ed. 414, 18 Sup. Ct. 45; Louisville and Nashville Railroad Co. vs. Behlmer, 175 U. S. 648, 654, 655, 44 L. Ed. 309, 20 Sup. Ct. 209. * * *

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity

of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play.

"That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive conditions because of the public interests and the other provisions of the statute, if of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency which would have to be met by increased charges upon other business. Clearly in such a case the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. * * *

"Applying the principle to which we have averted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel carriers to

desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition although they could do so at a margin of profit, the loss which would arise from the disappearance of such business without any wise benefiting the public."

E. Tenn., V. & Ga. Ry. Co. vs. I. C. C., 181 U. S. 1, 45 L. Ed. 719.

I. C. C. vs. Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729.

Compare:

Covington & Lexington Turnpike Road Co. vs. Sandford, 164 U. S. 578, 41 L. Ed. 560.

Smyth vs. Ames, 169 U. S. 466, 42 L. Ed. 819.

§ 2. Market Competition.

Market competition, as a term, is descriptive of all trade competition, and hence insofar as it affects the fixing of reasonable and nondiscriminatory freight rates, market competition is comprehensive of every form of competition except only bona fide railroad competition, and as the subject of competition is dealt with in the ensuing sections, this distinguishment will be recognized.

Probably by far the safer premise upon which to proceed with the analysis of the effect of competitive influences on transportation rates is that it is a well settled rule of both the courts and the Commission that a charge of undue discrimination cannot be predicated upon conditions which result from controlling competition. "It is a foregone conclusion," said the Commission in the **Trans-Continental case**, "that competition between jobbing houses and factories for trade can not exist without the jobbing houses and factories and, if a certain adjustment of freight rates prevents one town from securing the jobbing houses and factories in competition with another,

a situation is presented which the act to regulate commerce was designed to correct. The rule is therefore laid down that when the question of freight rates enters into the competition of cities and towns in any respect whatsoever, whether that competition is one for trade, factories, or people, complaints alleging unjust discrimination will be entertained by the Commission."

Transcontinental Commodity Rates, 32 I. C. C. Rep. 449, 454.
 Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 10.

Santa Rosa Traffic Assn. vs. S. P. Co., 29 I. C. C. Rep. 65.
 Santa Rosa Traffic Assn. vs. S. P. Co., 24 I. C. C. Rep: 46.

The effect of market competition in compelling low through rates to distant markets, irrespective of distance, was an element recognized by the Commission in many important cases. The compelling force of market competition brought with it the ever recurring danger that the preservation of low through rates to competitive centers would deny to intermediate points the advantage to which they were equitably entitled by reason of their geographical location.

Thus, the Commission recognized the economic necessity for the fruits of Florida and California reaching the eastern markets on a practical equality in transportation service; that the pineries of the extreme southern states must reach the middle west markets on a commercial parity with the lumber producing sections of the north and northwest; but that the low through rates effecting this market equalization, if relatively applied to the intermediate points would be ruinously unprofitable to the carriers. In a sense of superlative justness, the Commission granted relief to the carriers from the strict operation of the amended fourth section.

Import and Domestic Rates—Clay, 32 I. C. C. Rep. 132 (136).

- Pardee Works vs. C. R. R. Co. of N. J., 39 I. C. C. Rep. 162 (165).
- Drake Marble & Tile Co. vs. N. Y., O. & W. Ry. Co., 39 I. C. C. Rep. 392 (398).
- Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 523 (543).
- Heider Mfg. Co. vs. C. G. W. R. R. Co., 39 I. C. C. Rep. 556 (558).
- Traffic Bureau Sioux City Commercial Club vs. Am. Exp. Co., 39 I. C. C. Rep. 703 (719).
- Official Classification Rates on Paper, 38 I. C. C. Rep. 120 (121, 130).
- Royster Guano Co. vs. A. C. L. R. R. Co., 38 I. C. C. Rep. 190 (192).
- Kornfalfa Feed Milling Co. vs. A. T. & S. F. Ry. Co., 38 I. C. C. Rep. 307 (309).
- Lumber to C. M. & St. P. Ry. Stations, 38 I. C. C. Rep. 587 (589).
- Fargo Foundry Co. vs. N. P. Ry. Co., 38 I. C. C. Rep. 693 (694).
- R. R. Comm. of Florida vs. C. of G. Ry. Co., 38 I. C. C. Rep. 711 (714).
- 1915 Western Rate Advance Case—Part II, 37 I. C. C. Rep. 114 (136).
- Official Classification Ratings, 37 I. C. C. Rep. 166 (172).
- Lumber Rates to Eastern Cities, 37 I. C. C. Rep. 212 (215).
- McCormick & Co. vs. S. P. Co., 37 I. C. C. Rep. 234 (237).
- Public Service Commission of Missouri vs. Wabash R. R. Co., 37 I. C. C. Rep. 297 (300).
- Fabrication in Transit at Greenville, Pa., 37 I. C. C. Rep. 370 (371).
- Kosmos Portland Cement Co. vs. I. C. R. R. Co., 37 I. C. C. Rep. 449 (451).
- Broom Corn to Cincinnati, Ohio, 37 I. C. C. Rep. 482 (483).
- Lorain & Southern R. R. Co. Case, 37 I. C. C. Rep. 497 (501).
- Brownsville Cotton Oil & Ice Co. vs. C. R. I. & P. Ry. Co., 37 I. C. C. Rep. 503 (505).
- Brown & Sons Lumber Co. vs. L. & N. R. R. Co., 37 I. C. C. Rep. 507 (511).
- American Steel & Wire Co. vs. A. & V. Ry. Co., 37 I. C. C. Rep. 525 (526).
- Topeka Traffic Assn. vs. A. & W. Ry. Co., 37 I. C. C. Rep. 598.
- Holmes & Hallowell Co. vs. G. N. Ry. Co., 37 I. C. C. Rep. 627 (637).
- Traffic Bureau of Knoxville, Tenn., vs. C. N. O. & T. P. Ry. Co., 37 I. C. C. Rep. 687 (688).
- Cement to Long Island Points, 37 I. C. C. Rep. 694 (695).
- Harness to Oklahoma, 37 I. C. C. Rep. 726 (729).
- Big Basin Lumber Co. vs. S. P. Co., 37 I. C. C. Rep. 730 (733).
- New Orleans Joint Traffic Bureau vs. A. & S. Ry. Co., 37 I. C. C. Rep. 444 (447).
- Axton vs. K. & M. Ry. Co., 37 I. C. C. Rep. 389 (391).
- Ocean S. S. Co. of Savannah, 37 I. C. C. Rep. 422 (425).

- Brownsville Cotton Oil & Ice Co. vs. C. R. I. & P. Ry. Co.,
 37 I. C. C. Rep. 503 (506).
 Shelbyville Business Men's Assn. vs. L. & N. R. R. Co., 37
 I. C. C. Rep. 675 (680).
 Lake Line Applications under Panama Canal Act, 37 I. C. C.
 Rep. 77 (80).
 Steamship "Great Northern," 37 I. C. C. Rep. 260 (263).
 Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432 (434).
 The Boat "H. B. Plant," 37 I. C. C. Rep. 453 (455).
 S. P. Co. Ownership of Oil Steamers, 37 I. C. C. Rep. 525
 (536).
 Wattam vs. N. P. Ry. Co., 37 I. C. C. Rep. 101 (102).
 Lumber to Wisconsin Points, 37 I. C. C. Rep. 198 (200).
 Grain from Manitowoc, Wis., 37 I. C. C. Rep. 549 (553).
 Bekkedal vs. C. St. P. M. & O. Ry. Co., 37 I. C. C. Rep. 611
 (613).
 Bituminous Coal Rates to the Southeast, 37 I. C. C. Rep. 652
 (663).
 Shelbyville Business Men's Assn. vs. L. & N. R. R. Co., 37
 I. C. C. Rep. 675 (678, 681).
 Traffic Bureau of Knoxville, Tenn., vs. C. N. O. & T. P. Ry.
 Co., 37 I. C. C. Rep. 687 (691).
 Rates on Buckwheat and Corn Flour, 37 I. C. C. Rep. 364
 (365).
 Broom Corn to Frankfort, Ky., 37 I. C. C. Rep. 485 (486).
 Indiana Veneer & Lumber Co. vs. St. L. M. & S. Ry. Co., 37
 I. C. C. Rep. 579 (581).
 Pacific Motor Supply Co. vs. A. T. & S. F. Ry. Co., 37 I. C.
 C. Rep. 703 (705).
 Class Rates from Michigan and Wisconsin Points, 37 I. C. C.
 Rep. 739 (741).
 Paducah Board of Trade vs. C. B. & Q. R. R. Co., 37 I. C. C.
 Rep. 743 (750).
 Henderson Commercial Club vs. I. C. R. R. Co., 36 I. C. C.
 Rep. 20 (23).
 Coal and Coke Rates in the Southeast, 35 I. C. C. Rep. 107,
 188.
 Lebanon Commercial Club vs. L. & N. R. R. Co., 35 I. C. C.
 Rep. 204, 212.
 Des Moines Commodity Rates, 34 I. C. C. Rep. 281, 286.
 Corp. Comm. of New Mexico vs. A. T. & S. F. Ry. Co., 34 I.
 C. C. Rep. 292.
 Fourth Section Violations in the Southeast, 33 I. C. C. Rep.
 61, 71, 81, 82, 83, 84.
 Commodity Rates to Pacific Coast Terminals, 32 I. C. C. Rep.
 611, 619, 634.
 Rates on Sugar, 31 I. C. C. Rep. 495, 502, 503, 508, 510.
 Fourth Section Violations in Rates on Sugar, 31 I. C. C. Rep.
 511, 515, 516, 517, 518, 522, 523, 524, 525, 526, 527, 531.
 Fourth Section Violations in the Southeast, 30 I. C. C. Rep.
 153, 160, 185, 188, 206, 273, 277, 279, 291, 297, 304, 305, 308,
 310, 316, 325, 326, 328, 336.
 Cement Rates from Mason City, 30 I. C. C. Rep. 426, 427.
 Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep.
 621, 628, 630, 632, 633.

Paducah Board of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 583, 587.

In re Lumber Rates, 25 I. C. C. Rep. 50, 52, 59.

In re Rates on Salt, 24 I. C. C. Rep. 192, 194.

Kellogg Toasted Corn Flake Co. vs. M. C. R. R. Co., 24 I. C. C. Rep. 604, 606.

R. R. Commission of Nevada vs. S. P. Co., 21 I. C. C. Rep. 329, 367.

See also:

Florida Fruit & Vegetable Shippers' Protective Assn. vs. A. C. L. R. R. Co., 14 I. C. C. Rep. 476.

Hoerr vs. C. M. & St. P. Ry. Co., 11 I. C. C. Rep. 547.

The Wilmington Tariff Assn. vs. C. P. & V. R. R. Co., 9 I. C. C. Rep. 118.

City of Danville vs. S. Ry. Co., 8 I. C. C. Rep. 409.

George Tileston Milling Co. vs. N. P. Ry. Co., 8 I. C. C. Rep. 346.

Report of Senate Committee on Elkins Bill, 1905, Vol. IV, page 3294.

(1) Controlling Competition.—Competition of controlling force cannot be ignored by the Commission in determining whether an advantage in rate at the competitive point is undue or is one not chargeable to the carriers because involuntarily made. Competition which compels lower rates to one city than to another city similarly situated may justify such rate adjustment but the mere fact of competition regardless of its character, does not relieve carriers from the limitations of section 3 of the Act. And public interest itself may properly demand that a carrier shall not avail itself of competitive conditions to produce discrimination.

The effect of market competition is a broad one, and not susceptible of inflexible regulation, and while actual competition is necessary in order to produce undue discrimination, it must not overlook the requirements of section 1 of the act that all rates shall be reasonable. It is far easier to define the negative effect of market competition than its affirmative extent of influence upon rates.

It is well settled that distance is always a factor to be taken into consideration in determining either the reason-

ableness of a rate by itself or in considering its relation to rates to other points, but it is equally well settled that distance alone is not controlling. Competition is an important element, and there are various other considerations, all of which must be taken into account in determining the fact whether a particular rate or system of rates is, as a matter of law, reasonable or does not operate to effect an undue discrimination.

The fact that a carrier may voluntarily accept rates that it can be required to establish, and that whether or not a carrier will meet competitive conditions at a particular point rests primarily with the carrier, do not relieve the carrier having met the competitive conditions at one point, from the duty of meeting such conditions at a neighboring or related point justly entitled thereto.

Obviously, no general rule can be stated as controlling of the effect of competition upon rates. While competition at a given point may render the circumstances substantially dissimilar, and justify a discrimination against points where such competition is not controlling, such dissimilarity of circumstances does not relieve the carrier altogether from the restraint of section 3 of the Act, and the amount of discrimination must not be greater than the dissimilarity of circumstances demands.

The matter of meeting competition is a question left to the carriers so long as no undue discrimination results. Moreover, while market competition may be considered in determining a violation of section 3, it is no defense to a charge of undue prejudice that competition compels the low rate at the favored point, when similar conditions obtain at the point discriminated against.

Nebraska Bridge Supply & Lumber Co. vs. N. C. & St. L. Ry.
Co., 35 I. C. C. Rep. 86, 88.
Rates on Grain Milled in Transit, 35 I. C. C. Rep. 27, 31.

- Nebraska Bridge Supply & Lumber Co. vs. A. G. S. R. R. Co., 35 I. C. C. Rep. 90, 93.
- Oklahoma Cottonseed Crushers' Assn. vs. M. K. & T. Ry. Co., 35 I. C. C. Rep. 94, 102.
- Yellow Pine Sash, Door & Blind Mfrs. Assn. vs. S. Ry. Co., 35 I. C. C. Rep. 150, 154.
- Chattanooga Log Rates, 35 I. C. C. Rep. 163, 170.
- Lebanon Commercial Club vs. L. & N. R. R. Co., 35 I. C. C. Rep. 204, 214.
- Imperial Valley Cotton Co. vs. S. P. Co., 35 I. C. C. Rep. 215, 217.
- Rates for Transportation of Anthracite Coal, 35 I. C. C. Rep. 220, 231.
- Regulations as to Storage of Dairy Products, 35 I. C. C. Rep. 469, 472.
- Duncan & Co. vs. N. C. & St. L. Ry. Co., 35 I. C. C. Rep. 477, 482.
- 1915 Western Rate Advance Case, 35 I. C. C. Rep. 497, 590, 601.
- Hooker Hendrix Hdwe. Co. vs. M. K. & T. Ry. Co., 34 I. C. C. Rep. 3, 6, 7.
- Durham Coal & Iron Co. vs. C. of Ga. Ry. Co., 34 I. C. C. Rep. 10, 11.
- Meech & Stoddard vs. G. T. Ry. of Can., 34 I. C. C. Rep. 39, 40.
- Farmers' Cooperative Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60, 66.
- San Toy Coal Co. vs. A. C. & Y. Ry. Co., 34 I. C. C. Rep. 93, 95.
- City of Charlotte, N. C., vs. S. Ry. Co., 34 I. C. C. Rep. 128, 132.
- Rates on Hay to Chicago, 34 I. C. C. Rep. 150, 151.
- Grand Rapids Plaster Co. vs. L. S. & M. S. Ry. Co., 34 I. C. C. Rep. 202, 206.
- Monon Coal Co. vs. C. & E. I. R. R. Co., 34 I. C. C. Rep. 221, 226.
- Coffeyville Mercantile Co. vs. M. K. & T. Ry. Co., 34 I. C. C. Rep. 231, 232.
- Corp. Comm. of New Mexico vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 292, 297.
- Gile & Co. vs. S. P. Co., 34 I. C. C. Rep. 319, 322.
- Merchants' Exchange of St. Louis vs. B. & O. R. R. Co., 34 I. C. C. Rep. 341, 348.
- Nebraska State Railway Comm. vs. U. P. R. R. Co., 34 I. C. C. Rep. 381, 382.
- City of Danville, Va., vs. S. Ry. Co., 34 I. C. C. Rep. 430, 437.
- Sand and Gravel Rates from Wisconsin Points to Chicago, 34 I. C. C. Rep. 467, 468.
- Stock & Sons vs. C. M. & St. P. Ry. Co., 34 I. C. C. Rep. 481, 483.
- Chamber of Commerce of Milwaukee vs. C. M. & St. P. Ry. Co., 34 I. C. C. Rep. 581, 583.
- Rates on Lumber from Southern Points, 34 I. C. C. Rep. 652, 658.
- Cement Rates from Salt Lake City, 33 I. C. C. Rep. 5, 6.

- Boldt Co. vs. C. R. I. & P. Ry. Co., 33 I. C. C. Rep. 8, 12.
 Wisconsin & Arkansas Lumber Co. vs. St. L. I. M. & S. Ry. Co., 33 I. C. C. Rep. 33, 38.
 Public Utilities Commission of Idaho vs. O. S. L. R. R. Co., 33 I. C. C. Rep. 103, 107.
 Rates on Tomatoes from Jacksonville to Kansas City, 33 I. C. C. Rep. 145, 148.
 Lindsay & Co. vs. N. P. Ry. Co., 33 I. C. C. Rep. 150, 153.
 Lumber Rates from Helena, Ark., and Other Points, 33 I. C. C. Rep. 297, 300.
 Rosenblatt & Sons vs. A. A. R. R. Co., 33 I. C. C. Rep. 324, 326.
 Anson, Gilkey & Hurd Co. vs. S. P. Co., 33 I. C. C. Rep. 332, 334.
 Eastern Fruit Growers' Assn. vs. B. & O. R. R. Co., 33 I. C. C. Rep. 343, 346.
 Northern Pine Mfrs. Assn. vs. C. & N. W. Ry. Co., 33 I. C. C. Rep. 360, 362.
 Lindsay & Co. vs. Northern Exp. Co., 33 I. C. C. Rep. 394, 396.
 Delphos Mfg. Co. vs. P. Co., 33 I. C. C. Rep. 400, 401.
 Adrian Wire Fence Co. vs. L. S. & M. S. Ry. Co., 33 I. C. C. Rep. 403, 406.
 Grain Rates from Milwaukee, 33 I. C. C. Rep. 417, 418.
 Snow Lumber Co. vs. R. C. & S. Ry. Co., 33 I. C. C. Rep. 587, 588.
 Petit Salt Co. vs. C. M. & St. P. Ry. Co., 33 I. C. C. Rep. 590.
 Rates on Paper and Other Commodities, 33 I. C. C. Rep. 609, 611.
 Cullman Commercial Club vs. L. & N. R. R. Co., 33 I. C. C. Rep. 634, 637.
 Newport Mining Co. vs. C. & N. W. Ry. Co., 33 I. C. C. Rep. 645, 657.
 Texas Refining Co. vs. A. & V. Ry. Co., 32 I. C. C. Rep. 192, 193.
 New York Produce Exchange vs. N. Y. C. & H. R. R. R. Co., 32 I. C. C. Rep. 212, 217.
 Board of Trade of Kansas City vs. St. L. & S. F. R. R. Co., 32 I. C. C. Rep. 297, 305.
 Rates on Poultry in Western Trunk Line Territory, 32 I. C. C. Rep. 380, 381.
 Illinois Coal Cases, 32 I. C. C. Rep. 659, 671.
 Beatrice Commercial Club vs. C. B. & W. R. R. Co., 31 I. C. C. Rep. 173, 178.
 Phoenix Printing Co. vs. M. K. & T. Ry. Co., 31 I. C. C. Rep. 289, 290.
 Wichita Business Assn. vs. C. & O. W. Ry. Co., 31 I. C. C. Rep. 323, 324.
 Rates on Sugar, 31 I. C. C. Rep. 495, 509.
 Fourth Section Violations in Rates on Sugar, 31 I. C. C. Rep. 511, 516.
 Export Rates on Grain and Grain Products, 31 I. C. C. Rep. 616, 618.
 Hide Rates to Los Angeles, 31 I. C. C. Rep. 633, 636.

- Weatherford Chamber of Commerce vs. M. K. & T. Ry. Co., 31 I. C. C. Rep. 665, 667.
- Cheek & Sons vs. C. P. Ry. Co., 31 I. C. C. Rep. 265, 269.
- Allentown Portland Cement Co. vs. P. & R. Ry. Co., 31 I. C. C. Rep. 277, 279.
- Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 289.
- Memphis Freight Bureau vs. I. C. R. R. Co., 30 I. C. C. Rep. 471, 475.
- American Coal & Supply Co. vs. C. & N. W. Ry. Co., 30 I. C. C. Rep. 492, 493.
- Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep. 621, 630.
- Omaha Grain Exchange vs. N. P. Ry. Co., 30 I. C. C. Rep. 572, 578.
- Wichita Business Assn. vs. A. T. & S. F. Ry. Co., 30 I. C. C. Rep. 45, 48.
- Wheat Rates from Oklahoma, 30 I. C. C. Rep. 93, 96.
- Hormel & Co. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 98, 101.
- American Refining Co. vs. St. L. & S. F. R. R. Co., 30 I. C. C. Rep. 103.
- Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 233.
- Break-Bulk Rates on Grain, 30 I. C. C. Rep. 357, 360.
- Grain Rates to Pittsburgh, 30 I. C. C. Rep. 382, 383.
- Lake Superior Paper Co., Ltd., vs. D. S. S. & A. Ry. Co., 30 I. C. C. Rep. 403, 406.
- Morris, Johnson, Brown Mfg. Co. vs. I. C. R. R. Co., 30 I. C. C. Rep. 443.
- Chamber of Commerce of Macon vs. C. N. O. & T. P. Ry. Co., 30 I. C. C. Rep. 477.
- Coal Rates from Oak Hills, Colo., 30 I. C. C. Rep. 505, 509.
- Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 520.
- Decker & Sons vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 547, 549.
- Minneapolis Civic & Commerce Assn. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 663, 672.
- Southwestern Missouri Millers' Club vs. St. L. & S. F. R. R. Co., 29 I. C. C. Rep. 28, 31.
- Lake-and-Rail Butter and Egg Rates, 29 I. C. C. Rep. 45, 50.
- Maier & Co. vs. S. P. Co., 29 I. C. C. Rep. 103, 104, 105.
- Industrial Railways Case, 29 I. C. C. Rep. 212, 230.
- Youngstown Sheet & Tube Co. vs. P. & L. E. R. R. Co., 29 I. C. C. Rep. 428, 433.
- Chicago Board of Trade vs. A. T. & S. F. Ry. Co., 29 I. C. C. Rep. 438, 443.
- Kansas-California Flour Rates, 29 I. C. C. Rep. 459, 461.
- Swift & Co. vs. P. R. R. Co., 29 I. C. C. Rep. 464, 469.
- Atlanta Freight Bureau vs. N. C. & St. L. Ry. Co., 29 I. C. C. Rep. 476, 495.
- Norman Lumber Co. vs. L. & N. R. R. Co., 29 I. C. C. Rep. 565, 578.
- Application for relief denied, Maier & Co. vs. S. P. Co., 29 I. C. C. Rep. 103, 104.

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- Oklahoma Traffic Assn. vs. A. T. & S. F. Ry. Co., 29 I. C. C. Rep. 129, 134.
- Atlanta Freight Bureau vs. N. C. & St. L. Ry. Co., 29 I. C. C. Rep. 476, 481.
- Paducah Board of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 583, 585.
- Meridian Board of Trade vs. A. G. S. R. R. Co., 28 I. C. C. Rep. 360.
- Chamber of Commerce of Macon vs. C. N. O. & T. P. Ry. Co., 27 I. C. C. Rep. 263, 265.
- Wichita Wholesale Furn. Co. vs. St. L. I. M. & S. Ry. Co., 26 I. C. C. Rep. 107.
- Southern Furniture Mfrs. Assn. vs. S. Ry. Co., 25 I. C. C. Rep. 379.
- Mfrs. & Merchants' Assn. vs. A. A. R. R. Co., 25 I. C. C. Rep. 116, 119.
- North Fork Cannel Coal Co. vs. A. A. R. R. Co., 25 I. C. C. Rep. 241, 246.
- Arkansas Fertilizer Co. vs. St. L. I. M. & S. Ry. Co., 25 I. C. C. Rep. 645, 648.
- In re* Advances on Manganese Ores, 25 I. C. C. Rep. 663, 668.
- Chamber of Commerce of New York vs. N. Y. C. & H. R. R. Co., 24 I. C. C. Rep. 55, 57.
- Business Men's League of Albert Lea vs. B. & O. R. R. Co., 24 I. C. C. Rep. 125, 127.
- Slider vs. S. Ry. Co., 24 I. C. C. Rep. 312, 313.
- Johnson & Son vs. C. & O. Ry. Co., 24 I. C. C. Rep. 698, 700.
- Sioux City Terminal Elevator Co. vs. C. M. & St. P. Ry. Co., 23 I. C. C. Rep. 98, 107.
- Chamber of Commerce of Newport News vs. S. Ry. Co., 23 I. C. C. Rep. 345, 353.
- Chamber of Commerce Ashburn, Ga., vs. G. S. & F. Ry. Co., 23 I. C. C. Rep. 140, 150.
- Chamber of Commerce, of Newport News vs. G. S. & F. Ry. Co., 23 I. C. C. Rep. 140, 149.
- Corporation Commission of North Carolina vs. N. & W. Ry. Co., 19 I. C. C. Rep. 303, 309.
- Penn. Tobacco Co. vs. Old Dominion S. S. Co., 18 I. C. C. Rep. 197, 200.
- Acme Cement Plaster Co. vs. L. S. & M. S. Ry. Co., 17 I. C. C. Rep. 30, 36.
- Montgomery Freight Bureau vs. L. & N. R. R. Co., 17 I. C. C. Rep. 521, 529.
- Planters' Gin & Compress Co. vs. Y. & M. V. R. R. Co., 16 I. C. C. Rep. 131, 133.
- Darling & Co. vs. B. & O. R. R. Co., 15 I. C. C. Rep. 79, 87.
- Nebraska State Railway Commission vs. U. P. R. R. Co., 13 I. C. C. Rep. 349, 355.

See also:

- Spiegle & Co. vs. So. Ry. Co., 19 I. C. C. Rep. 522, 525.
- Paragon Plaster Co. vs. N. Y. C. & H. R. R. R. Co., 19 I. C. C. Rep. 480.

- Paragon Plaster Co. vs. N. Y. C. & H. R. R. Co., 19 I. C. C. Rep. 119, 125.
Indiana Steel & Wire Co. vs. C. R. I. & P. R. Co., 16 I. C. C. Rep. 155.
R. R. Com., etc., vs. A. A. R. R. Co., 17 I. C. C. Rep. 418.
Ashland Fire Brick Co. vs. So. Ry. Co., 22 I. C. C. Rep. 115, 120.
Re Restricted Rates, 20 I. C. C. Rep. 426, 437.
Black & Son, etc., vs. B. & O. R. R. Co., 20 I. C. C. Rep. 139, 140.
Interl. Salt Co. vs. Pa. R. Co., 20 I. C. C. Rep. 539.
Am. Cigar Co. vs. P. & R. R. Co., 20 I. C. C. Rep. 81, 82.
Natl. League, etc. vs. A. C. L. R. R. Co., 20 I. C. C. Rep. 132, 134.
Scheming vs. L. & N. R. R. Co., 20 I. C. C. Rep. 550, 551.
Coml. Club., etc., vs. S. P. Co., 12 I. C. C. Rep. 495.

See also:

Sections 17, sub. (1), and 25, subs. (3), and (8).

§ 3. Creating Artificial Market Conditions.

A carrier may not lawfully establish and maintain an adjustment of rates which, in its practical effect, prevents shippers on the carrier's line from availing themselves of a principal market which they have long been using, and confers a substantial monopoly upon a new market in which, for reasons of its own, the carrier has greater interest.

If a carrier makes rates to two competing markets which give the one a practical monopoly over the other because the carrier can secure reshipments from such favored market and not from the other, it goes beyond a fair service and disregards the statutory requirements of relative equality between persons, localities and particular descriptions of traffic.

It is neither sound in principle nor in practice for railways to create artificial market conditions by an arbitrary differential in rates whereby the products of one section of the country are assigned to one market and

the products of another section of the country to another market.

Savannah Bu., etc., vs. L. & N. R. R. Co., 8 I. C. C. Rep. 377.
Re Export Rates, etc., 8 I. C. C. Rep. 185.

Nor has a carrier the right to force its services upon a shipper or insist upon carrying his shipments to a certain market when the shipper desires to reach another market. It is not the right of a carrier to insist that a shipment shall move to the end of its rails where the shipper desires his shipment to be diverted to an intermediate point for ultimate delivery to another market off the rails of the initial carrier. To accomplish this result indirectly by any unreasonable adjustment of its rate schedules, the railroad perverts its province as carrier and unlawfully compels the shipping public to contribute to its revenues.

This principle was followed in *Star Grain & Lumber Co. vs. A. T. & S. F. Ry. Co.*, 14 I. C. C. Rep. 364, where the Commission held that the carrier was under a duty to establish through routes and joint rates in a case where its failure so to do restricted or circumscribed the legitimate markets of the shipper, and that the carrier could not lawfully refuse traffic from points on connecting lines on the ground that such traffic would displace in the market, traffic from off its own line.

Chamber of Commerce, etc., vs. C. R. I. & P. Ry. Co., 15 I. C. C. Rep. 460, 464.

See also:

Blackwell M. & E. Co. vs. M. K. & T. R. R. Co., 12 I. C. C. Rep. 24.

As a matter of sound policy under the law, a carrier is not justified in attempting to restrict its traffic to move to points on its own line. Such exercise of a carrier's rate-

making power is far too arbitrary and too selfish to be permitted under the Act. It is not consonant with the broad purposes of the regulation, as was so clearly expressed by the Commission in **Missouri & Illinois Coal Co. vs. I. C. R. R. Co.**, 22 I. C. C. Rep. 39, 46:

"Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The principal, if not the only reason why carriers do not desire in certain cases to maintain joint through rates from producing points on the one line to consuming points on the other is that each desires to supply the demand of its consuming points from producing points on its line. It is said to be good business policy for a railroad, by adjustment of rates, to give its industries a practical monopoly of the traffic on its line. But a carrier has no right, by refusing through routes and joint rates to dictate what market from which shippers on its line must purchase, or the territory to which industries on its line must sell, or in any other way to restrict fair competition.

Lumber to C. M. & St. P. Ry. Stations, 38 I. C. C. Rep. 587, 588.

See also:

Lumber Rates from Texas, Louisiana and Arkansas, 28 I. C. C. Rep. 471, 473, 476.

Star Grain & Lumber Co. vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 364, 366.

§ 4. Railroad Competition.

Railroad competition may justify differences in rates. In fact it is the policy of Congress to encourage railroad

competition. The Commission has held that competition between markets of distribution alone does not constitute a justification for the maintenance of lower rates to a more distant than to an intermediate point. The competition of carriers serving other markets of supply does constitute, however, in the view of the Commission, a justification in some instances for lower rates to more distant than to less distant points, where it is found:

First, that the route from one market is under a material disadvantage as against that from another.

Second, that the line seeking relief is consistently meeting at all points the competition against which the relief is sought.

Corporation Comm. of New Mex. vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 592.

Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 279.

Moise Bros. Co. vs. C. R. I. & P. Ry. Co., 16 I. C. C. Rep. 550.

Pecos Mercantile Co. vs. A. T. & S. F. Ry. Co., 13 I. C. C. Rep. 173, 177.

Carriers maintain the right to and frequently do establish and maintain rates lower than they could be required to publish to meet competition or other conditions at a particular point, but they are not thereby relieved from the obligation imposed by law to remove unjust discrimination which may arise from meeting competition or other conditions at one point and refusing to meet the same conditions at another point entitled to the same consideration.

In *Black Mountain Coal Land Co. vs. S. Ry. Co.*, 15 I. C. C. Rep. 286, 292, the Commission said:

"A carrier can not lawfully so group its mines with respect of rates as to unduly discriminate against any locality. The duty imposed by law is to give equal

treatment to all shippers who are in position to demand it, and this includes the right to reach competitive markets on relatively equal terms. Carriers are not required by law and could not in justice be required to equalize natural disadvantages, such as location, cost of production, and the like. Where, however, the same carrier serves two districts which, by their location, the character of their output, and distance from markets where their product must be disposed of, are in substantially similar circumstances and conditions, the serving carrier can not lawfully prefer one to the other in any manner whatsoever."

See also:

- Massie & Pierce Lumber Co. vs. N. & W. Ry. Co., 33 I. C. C. Rep. 14, 24.
New Pittsburgh Coal Co. vs. H. V. Ry. Co., 24 I. C. C. Rep. 244, 248.
Pittsburgh Vein Operators' Assn. of Ohio, vs. P. Co., 24 I. C. C. Rep. 280, 286.
Boileau vs. P. & L. E. R. R. Co., 22 I. C. C. Rep. 640, 655.

Compare:

- Knoxville Overall Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 330, 332.
Crunden-Martin Mfg. Co. vs. M. P. Ry. Co., 39 I. C. C. Rep. 631, 632.
Gile & Co. vs. S. P. Co., 39 I. C. C. Rep. 193, 197.
Okla. Cottonseed Crushers' Assn. vs. M. K. & T. Ry. Co., 39 I. C. C. Rep. 497, 512.
Paducah Board of Trade vs. C. B. & Q. R. R. Co., 37 I. C. C. Rep. 743, 756.
Cement to Long Island Points, 37 I. C. C. Rep. 694, 695.
Traffic Bureau of Knoxville, Tenn., vs. C. N. O. & T. P. Ry. Co., 37 I. C. C. Rep. 687, 691.
Shelbyville Business Men's Assn. vs. L. & N. R. R. Co., 37 I. C. C. Rep. 675, 678.
Wattam vs. N. P. Ry. Co., 37 I. C. C. Rep. 101, 102.
Lumber to Wisconsin Points, 37 I. C. C. Rep. 198, 200.
Grain from Manitowoc, Wis., 37 I. C. C. Rep. 549, 553.
Brownsville Cotton Oil & Ice Co., vs. C. R. I. & P. Ry. Co., 37 I. C. C. Rep. 503, 506.
Bekkedal vs. C. St. P. M. & O. Ry. Co., 37 I. C. C. Rep. 611, 613.
Bituminous Coal Rates to the Southeast, 37 I. C. C. Rep. 652, 663.

- Rates on Bituminous Coal to Mississippi Valley, 36 I. C. C. Rep. 401, 407.
- Globe Grain & Milling Co. vs. A. T. & S. F. Ry. Co., 36 I. C. C. Rep. 662, 665.
- Through Rates from Buffalo-Pittsburgh Territory, 36 I. C. C. Rep. 325, 328.
- Class and Commodity Rates, 36 I. C. C. Rep. 317, 320.
- Neb. State Ry. Comm. vs. C. B. & Q. R. R. Co., 36 I. C. C. Rep. 219, 221.
- Ladd & Co. vs. Gould Southwestern Ry. Co., 36 I. C. C. Rep. 179, 182.
- Stopping of Cars in Transit to Complete Loading, 36 I. C. C. Rep. 130, 131.
- Midcontinent Oil Rates, 36 I. C. C. Rep. 109, 117.
- The Iron and Steel Cases, 36 I. C. C. Rep. 86, 95.
- Henderson Commercial Club vs. I. C. R. R. Co., 36 I. C. C. Rep. 20, 28.
- Oklahoma Cottonseed Crushers' Assn. vs. M. K. & T. Ry. Co., 35 I. C. C. Rep. 94, 104.
- Cape Girardeau Portland Cement Co. vs. St. L. & S. F. R. R. Co., 35 I. C. C. Rep. 109, 114.
- Regulations as to Storage of Dairy Products, 35 I. C. C. Rep. 469, 471.
- Rates on Cotton Piece Goods, 34 I. C. C. Rep. 41, 43.
- Grand Rapids Plaster Co. vs. L. S. & M. S. Ry. Co., 34 I. C. C. Rep. 202, 205.
- Eastbound Transcontinental Cotton Rates, 34 I. C. C. Rep. 248, 250.
- Corp. Comm. of New Mexico vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 292, 301.
- Memphis Grain & Hay Assn. vs. I. C. R. R. Co., 34 I. C. C. Rep. 315, 318.
- Nebraska State Railway Comm. vs. U. P. R. R. Co., 34 I. C. C. Rep. 381, 382.
- Montrose & Delta Counties Freight Rate Assn. vs. D. & R. G. R. R. Co., 34 I. C. C. Rep. 393, 394.
- Montrose & Delta Counties Freight Rate Assn. vs. D. & R. G. R. R. Co., 34 I. C. C. Rep. 409, 410.
- Pacific Creamery Co. vs. S. P. Co., 34 I. C. C. Rep. 586, 589.
- Massie & Pierce Lumber Co. vs. N. & W. Ry. Co., 33 I. C. C. Rep. 14, 22.
- City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 77.
- Coffeyville Mercantile Co. vs. M. K. & T. Ry. Co., 33 I. C. C. Rep. 122, 124.
- Financial Relations, etc., L. & N. R. R. Co., 33 I. C. C. Rep. 168.
- Bituminous Coal Rates to Baltimore and Other Points, 33 I. C. C. Rep. 307, 309.
- Lumber Rates to Central Freight Assn. & Trunk Line Territory, 33 I. C. C. Rep. 322, 323.
- Rosenblatt & Sons vs. A. A. R. R. Co., 33 I. C. C. Rep. 324, 325.
- Eastern Fruit Growers' Assn. vs. B. & O. R. R. Co., 33 I. C. C. Rep. 343, 348.

- Rates on Grain and Grain Products, 33 I. C. C. Rep. 374, 375.
- Grain Rates from Milwaukee, 33 I. C. C. Rep. 417, 418.
- Ownership of Dallas, Portland & Astoria Navigation Co., 33 I. C. C. Rep. 462, 465.
- Daly Coal Co. vs. C. & A. R. R. Co., 33 I. C. C. Rep. 467, 468.
- Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 530.
- Cullman Commercial Club vs. L. & N. R. R. Co., 33 I. C. C. Rep. 634, 636.
- Portland Chamber of Commerce vs. C. M. & St. P. Ry. Co., 32 I. C. C. Rep. 188, 190.
- Cement Rates to Stations on Midland Continental R. R. Co., 32 I. C. C. Rep. 540, 541, 542.
- Sugar Rates from New Orleans, 32 I. C. C. Rep. 606, 610.
- Bowling Green Business Men's Assn. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 1, 4.
- Financial Investigation of N. Y. N. H. & H. R. R. Co., 31 I. C. C. Rep. 32, 41.
- Switching at Galesburg, Ill., 31 I. C. C. Rep. 294, 297.
- Louisiana Sugar Planters' Assn. vs. I. C. R. R. Co., 31 I. C. C. Rep. 311, 315.
- Fourth Section Violations in Rates on Sugar, 31 I. C. C. Rep. 511, 515.
- New Orleans Live Stock Exchange vs. L. & N. R. R. Co., 31 I. C. C. Rep. 609, 611, 612.
- Stuart's Draft Milling Co. vs. S. Ry. Co., 31 I. C. C. Rep. 623, 627.
- Pacific Coast Gypsum Co. vs. O.-W. R. R. & N. Co., 30 I. C. C. Rep. 135, 138.
- Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 156.
- Seattle Shingle Co. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 364, 369.
- Brownsville, Tex., Class and Commodity Rates, 30 I. C. C. Rep. 479, 483.
- Richmond Chamber of Commerce vs. S. A. L. Ry. Co., 30 I. C. C. Rep. 552, 558.
- Omaha Grain Exchange vs. N. P. Ry. Co., 30 I. C. C. Rep. 572, 579.
- Page Milling Co. vs. N. & W. Ry. Co., 30 I. C. C. Rep. 605, 607.
- Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep. 621, 630.
- Seattle Chamber of Commerce vs. G. N. Ry. Co., 30 I. C. C. Rep. 683, 690.
- Atlanta Freight Bureau vs. N. C. & St. L. Ry. Co., 29 I. C. C. Rep. 476, 481.
- Emlenton Petroleum Rates, 29 I. C. C. Rep. 519, 521.
- Norman Lumber Co. vs. L. & N. R. R. Co., 29 I. C. C. Rep. 565, 577.
- Paducah Board of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 583, 585.
- Fort Scott Industrial Assn. vs. St. L. & S. F. R. R. Co., 29 I. C. C. Rep. 629, 631.

- Refrigeration Charges on Fruits and Vegetables, 29 I. C. C. Rep. 653, 654.
 Coke Producers' Assn. of Connellsville vs. B. & O. R. R. Co., 27 I. C. C. Rep. 125.
 Gund & Co. vs. C. B. & Q. R. R. Co., 25 I. C. C. Rep. 326, 329.
 Arkansas Fertilizer Co. vs. St. L. I. M. & S. Ry. Co., 25 I. C. C. Rep. 645, 648.
 Commercial Club of Superior vs. G. N. Ry. Co., 24 I. C. C. Rep. 96, 103.
 American Cigar Co. vs. P. & R. Ry. Co., 20 I. C. C. Rep. 81, 82.
 Blake & Son Hardware & Mfrs. Co. vs. B. & O. R. R. Co., 20 I. C. C. Rep. 139.
 Corporation Commission of North Carolina vs. N. & W. R. Co., 19 I. C. C. Rep. 303.
 Paragon Plaster Co. vs. N. Y. C. & H. R. R. R. Co., 19 I. C. C. Rep. 480.
 Colorado Coal Traffic Assn. vs. C. & S. Ry. Co., 18 I. C. C. Rep. 572, 576.
 Kansas City Transportation Bureau vs. A. T. & S. F. Ry. Co., 16 I. C. C. Rep. 195, 203, 207.
 Board of City of Bristol, Tenn., vs. So. Ry. Co., 15 I. C. C. Rep. 487, 490.
 Indianapolis Freight Bu. vs. C. C. C. & St. L. Ry. Co., 15 I. C. C. Rep. 504, 516.
 The Traffic Bu., St. Louis, vs. M. P. Ry. Co., 13 I. C. C. Rep. 11, 13, 14.
 Miller Walnut Co. vs. A. T. & S. F. Ry. Co., 13 I. C. C. Rep. 43, 45.
 New Albany Furn. Co. vs. M. J. & K. C. R. R. Co., 13 I. C. C. Rep. 594, 599.
 I. C. C. vs. C. G. W. Ry. Co., 209 U. S. 108, 122.
 N. & W. Ry. Co. vs. U. S., 195 Fed. Rep. 953.
 L. & N. R. R. Co. vs. I. C. C., 195 Fed. Rep. 541.
 L. & N. R. R. Co. vs. I. C. C., 184 Fed. Rep. 118.
 C. G. W. Ry. Co. vs. I. C. C., 141 Fed. Rep. 1003.

§ 5. Special Commodity Rates as Form of Railroad Competition.

Special commodity rates to meet special circumstances in production or consumption, such as a public building causing quarry competition for the stone, may be the cause of undue disadvantage to certain shippers. In such a case a rate from the quarry to the point of consumption could never interest shippers at intermediate points, for the quarry having the contract to furnish the stone would be the only quarry furnishing stone to this particular build-

ing. The Commission has permitted such rates to be established without requiring tariffs to be filed from the intermediate points.

Special commodity rates arising from railroad competition have been recognized as an element requiring permissive relief from the amended fourth section. Railroad competition is, in reality, but another form of the effect of meeting the rate of the short line. All railroad competition may not justify a deviation from the fourth section, but, generally speaking, where the rate from the intermediate points are reasonable, railroad competition with direct lines will justify a circuitous line in seeking relief from the fourth section. It will be remembered that the Commission ordinarily treats a line as circuitous where it exceeds the direct line in mileage by not less than fifteen per cent, but that this rule is not necessarily given universal application because of the possibility of other elements besides distance requiring consideration.

City of Charlotte, N. C., vs. S. Ry. Co., 34 I. C. C. Rep. 128, 134.

Proportional Class Rates to Iowa Points, 34 I. C. C. Rep. 278, 280.

Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 336.

Cement Rates from Mason City, 30 I. C. C. Rep. 426.

Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep. 621, 633.

Rock Spring Distilling Co. vs. I. C. R. R. Co., 29 I. C. C. Rep. 18, 25.

Stewart-Greer Lumber Co. vs. St. L. I. M. & S. Ry. Co., 29 I. C. C. Rep. 120, 122.

Emlenton Petroleum Rates, 29 I. C. C. Rep. 519, 521.

Standard Oil Co. vs. P. Co., 29 I. C. C. Rep. 524, 525.

Interior Iowa Cities Case, 29 I. C. C. Rep. 536, 538.

National R. & B. S. Co. vs. St. L. M. & Q. Ry. Co., 26 I. C. C. Rep. 524, 527.

McCullough vs. L. & N. R. R. Co., 25 I. C. C. Rep. 48, 49.

Edwards & Bradford Lumber Co. vs. C. B. & Q. R. R. Co., 25 I. C. C. Rep. 93, 94.

In re Lumber Rates from the South, 25 I. C. C. Rep. 50, 56.

In re Southern Ry. Co., 25 I. C. C. Rep. 407, 410.

Lebanon Commercial Club vs. L. & N. R. R. Co., 25 I. C. C. Rep. 277, 279.

In re Suspension of Rates on Lime, 24 I. C. C. Rep. 170, 172.
 Rates on Salt, 24 I. C. C. Rep. 192, 195.
 Bowling Green Business Men vs. L. & N. R. R. Co., 24 I. C. C. Rep. 228, 239.
 Kellogg Corn Flakes Co. vs. M. C. R. R. Co., 24 I. C. C. Rep. 604.
 Wright Wire Co. vs. P. & L. E. R. R. Co., 21 I. C. C. Rep. 64.
 City of Spokane vs. N. P. Ry. Co., 21 I. C. C. Rep. 400, 414.

§ 6. Short Line Competition.

Section 1 of the act requires carriers by railroad to establish through routes and to interchange cars with connecting carriers. Through routes and the interchange of cars are expressly included among the facilities for the interchange of traffic which the second paragraph of section 3 in turn requires carriers to afford to all connecting carriers equally and without discrimination in rates and charges. Section 15 empowers the Commission to establish through routes over connecting lines whenever the carriers themselves refuse or neglect to establish them voluntarily. Section 15 also provides that in establishing such through routes the Commission shall not "require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through routes, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This provision, however, relates exclusively to the power of the Commission to establish through routes, and, since orders against discrimination by carriers between their connections in the matter of through routes are enforceable without the establishment of through routes by the Commission, it does not apply to the provisions of section 3 either expressly or by necessary impli-

cation. Where carriers short haul their respective lines in favor of each other, they can not under the act as now amended refuse to interchange traffic with another carrier solely on the ground that they would thereby short haul their own lines.

This principle was applied in the **Ogden Gateway Case**, 35 I. C. C. Rep. 131, 141, where the Commission said:

"The situation before us is a very practical one. The Denver & Rio Grande route, as hereinbefore pointed out, is longer by nearly 400 miles and is 19 hours longer in point of time. Under such circumstances if no through route were now open, an order, based on the record before us, requiring the Union Pacific system to short haul itself by establishing the present parity of fares over the Denver & Rio Grande would be illogical and arbitrary in the highest degree. It would be no less so should we undertake to exercise our power under the same provision of law by compelling the Union Pacific to continue a rate adjustment which we could not lawfully require it to establish as an original question. The fact that such an adjustment is now in effect and has voluntarily been maintained for many years gives the protestant and the communities served by it no vested right to a continuance of the adjustment for all time to come; and the differences between the two routes in mileage and point of time and in their physical characteristics are too substantial to be disregarded, even if our powers under the provision of the act relating to joint rates and through routes were plenary and entirely unrestricted by the important limitations pointed out in the cases above cited. To force the Union Pacific to continue the present parity of rates over the Denver & Rio Grande, notwithstanding the great differences in the character of the two routes, would be in complete disregard of its definite legal right under section 15 of the act not to be short hauled against its will and consent.

"All things considered, the general contentions of the Union Pacific on the questions at issue must be sustained; and in reaching that conclusion we have not overlooked the fact that under tariff authority it offers to passengers over its direct route certain side trips without additional charge. When this free mileage is added to the mileage of its direct route between the points in question the disparity in the service as between the routes is substantially modified. In our judgment, however, this does not alter, but the necessity for holding out such inducements to travelers to use its more direct route rather emphasises, the right of the Union Pacific to take the action proposed in the tariffs under suspension and in those about to be filed, as is explained of record and heretofore mentioned. The contention of the Denver & Rio Grande that it will be subjected to undue discrimination if the Union Pacific refuses longer to be short hauled by it between Denver and Ogden while it permits the the prairie lines to short haul it from Kansas City and Omaha to Denver is without force. The Denver & Rio Grande is not affected in any way by the arrangements of the Union Pacific with the prairie lines, and we have been unable to see that its different policy under the different conditions prevailing east of Denver can be said to subject the Denver & Rio Grande to any undue discrimination when the Union Pacific enforces another policy west of Denver. A policy of this kind on the part of the Union Pacific with respect to one part of its system cannot be held to be an undue discrimination as a matter of law because of a different policy with respect to another part of its line, unless it so works out as a matter of fact and in actual practice. This is not the case here. There is undoubtedly a difference in treatment, but it is followed by no adverse consequences to the Denver & Rio Grande. Should the respondent also withdraw its present joint passenger fares with the prairie lines no benefit would accrue to the Denver & Rio Grande; nor do we see that any harm would result to it by the

continuance of joint fares between the Union Pacific and the prairie lines up to Denver after the parity of rates over the Denver & Rio Grande route shall have been withdrawn.

"Upon the argument the respondent indicated its purpose to modify its tariffs here under consideration by making round-trip tickets to the Yellowstone Park available in one direction over the Denver & Rio Grande. We think this should be done in the general interest of both lines and in the interest of the traveling public. It appears also that between some of the points in question, especially on travel from the south and southeast by way of Pueblo or Colorado Springs, the route over the rails of the Denver & Rio Grande is shorter than the Union Pacific route, and in other cases is approximately as short. While this phase of the matter received relatively little attention on the argument and is not fully discussed upon the record, it may be well to say that as at present advised we think the present adjustment should not be disturbed in such cases, if that can be avoided. We see no reason also why any departures from the provisions of the fourth section should be permitted as the result of the course here proposed by the Union Pacific system."

Ogden Gateway Case, 35 I. C. C. Rep. 131, 141.

Durham Coal & Iron Co. vs. C. of Ga. Ry. Co., 34 I. C. C. Rep. 10, 12.

Lumber Rates from Points in Arkansas, 34 I. C. C. Rep. 102, 104.

City of Danville, Va., vs. S. Ry. Co., 34 I. C. C. Rep. 430, 433.

Peet Bros. Mfg. Co. vs. I. C. R. R. Co., 34 I. C. C. Rep. 634, 636.

Spartanburg Chamber of Commerce vs. S. Ry. Co., 34 I. C. C. Rep. 484, 486.

Echols & Co. vs. A. & W. Ry. Co., 34 I. C. C. Rep. 644, 646.

Wilson-Leuthold Lumber Co. vs. C. W. & St. P. Ry. Co., 34 I. C. C. Rep. 146.

City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 86.

Rates on Grain and Grain Products, 33 I. C. C. Rep. 374, 376.

- Beatrice Commercial Club vs. C. B. & Q. R. R. Co., 33 I. C. C. Rep. 173, 181.
 R. R. Comrs. of Montana vs. B. A. & P. Ry. Co., 33 I. C. C. Rep. 641, 648.
 Lumber Rates from Oregon and Washington, 32 I. C. C. Rep. 609, 617.
 Randolph Lumber Co. vs. Seaboard Air Line Ry. Co., 13 I. C. C. Rep. 601, 603.

§ 7. Water Competition.

The most substantial, and probably controlling, ground for relief from the prohibition of the amended fourth section is that of water competition. The effect of water competition upon railroad rates is both direct and potential. While it is true that the commerce moving upon the navigable rivers of the country is relatively small, the coastwise movements are extensive and exert a formidable force upon competitive rail rates. The effect of lake commerce has always compelled the lowering of the rates of the competitive rail lines, despite the effect of the joint ownership of lake and rail lines prior to their recent divorcement.

Other conditions being equal the Commission recognizes in legitimate water competition a necessity for deviation in competing rail rates from the prohibition of section 4 as now amended. In dealing with cases where the higher rate to an intermediate point is justified upon the ground of water competition, the Commission has certain rules for its guidance:

- (1) Is it true that the long-distance rate is forced by water competition?
- (2) Is the long-distance rate which has been established in view of water competition less than would otherwise be reasonable?
- (3) Are the rates at the intermediate points reasonable?

(4) Do the rates unduly prefer one locality to another?

The crucial cases in the adjustment of the effect of water competition upon rail rates within the purview of the inhibitions of the amended fourth section are the Intermountain Cases, which represented in their final disposition by the Supreme Court of the United States the end of a twenty-six year struggle between the carriers and the Pacific Coast shipping interests. It was by far the most important transportation controversy in the commercial history of the country. The controversy included both a struggle for supremacy between the judicial and administrative departments of the national government and an increasing effort on the part of the extreme western shippers to remove discriminations in transcontinental rates to and from intermediate or intermountain points. The labors of the Commission in determining an equitable adjustment of these gigantic rate controversies centered in the Spokane Case (*City of Spokane vs. N. P. Ry. Co.*, 21 I. C. C. Rep. 400, 423, 424).

For the purpose of disposing of the Spokane case under the fourth section the Commission divided the United States into five territorial zones, as follows: Zone No. 1 comprised all that portion of the United States lying west of a line called line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly along the northwestern shore of Lake Superior to a point immediately east of Superior, Wis; thence southerly along the eastern boundary of transcontinental group F to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Ry. to the Gulf of Mexico. Zone No. 2 embraced all territory in the United States lying east of line No. 1 and west of

a line called line No. 2, which begins at the international boundary between the United States and Canada immediately west of Cockburn Island in Lake Huron, passes westerly through the Straits of Mackinaw, southerly through Lake Michigan to its southern boundary; follows the west boundary of transcontinental group C to Paducah, Ky.; thence follows the east side of the Illinois Central R. R. to the southern boundary of transcontinental group C; thence follows the east boundary of group C to the Gulf of Mexico. Zone No. 3 embraced all territory in the United States lying east of line No. 2 and north of the southern boundary of transcontinental group C and west of line No. 3, which is the Buffalo-Pittsburgh line from Buffalo, N. Y., to Wheeling, W. Va.; thence follows the Ohio River to Huntington, W. Va. Zone No. 4 embraced all territory in the United States east of line 3 and north of the south boundary of transcontinental group C. Zone No. 5 embraced all territory south and east of transcontinental group C.

In its decision the Commission held that from Zone No. 1, no higher charge could justly be made at any intermediate point than a more distant point, and there is no justification for a system of rates which maintains from this territory a higher charge to any interior point than is made to the coast. From Zone No. 2 the rates to intermediate points might properly exceed by not more than 7 per cent, rates from the same points of origin to Pacific coast terminals. In Zone No. 3 the rates from points of origin to intermediate points may properly exceed those to terminal points by not more than 25 per cent. In Zone No. 5 no opinion was expressed, since rates from this territory were not involved in the proceedings. *City of Spokane vs. N. P. Ry. Co.*, 21 I. C. C. 400, 425, 426; order enjoined in *A. T. & S. F. Ry. Co. vs. U. S.*, 191 Fed. 856, holding that

the Commission by its orders respecting the relation of rates from eastern points to Spokane, Reno and other intermountain cities as compared with the rates to Pacific coast terminals established certain zones and entered orders which did not establish absolute rates for either the long or short haul, or prescribe the extent in dollars and cents, that the short-haul rate might exceed the present or some definitely fixed long-haul rate, but established a relation between any long-haul rate that the carrier might put into effect and the short-haul rate by determining that from Zone 1 the western short-haul rate should not exceed the long-haul rate, and from Zones 2, 3, and 4 the short-haul rate should not exceed the long-haul rate by more than 7 per cent, 15 per cent and 25 per cent respectively, and, therefore, the Commission exceeded its authority, since it has no power to say that any given percentage of an unknown less than reasonable rate to the coast is necessary a maximum reasonable and non-discriminatory rate from the same point of origin to an interior point.

Spokane is an important distributing center and bids fair to be a still larger one. It demands the right to rates which will enable it to bring from the east and distribute into territory lying east of the Cascade range. Such traffic, when distributed from Spokane, is hauled a less distance by 400 miles than when distributed from Seattle, and the distribution haul itself is also much less expensive. It is a manifest economic waste to haul traffic over the Cascade Mountains and back again. The interest of the carrier and the public as much require that this business should stop at Spokane, instead of going on to Seattle, as that it should originate in the middle west instead of upon the Atlantic seaboard. Spokane insists that if these defendants give to Seattle the right to buy in both New

York and Chicago, when its location entitles it to buy in New York alone, they should give to Spokane, which is nearer by 400 miles, the right to buy in both New York and Chicago. New York urges that if Chicago is given an opportunity to sell in Seattle then New York shall be given the opportunity to sell in Spokane. In other words, the same blanket rate which is applied on the east should be applied upon the west. The carriers insist that they may determine as a matter of policy whether they will meet this water competition and in what manner and at what points; and this is true so far as that is a matter of policy. To a disinterested observer it would seem to be in the true interest of these transcontinental lines, which begin at the Missouri River, to make rates which would build up interior points as against the coast. The haul to these points is shorter and less expensive. The distribution from these points is easier, but, above all, the traffic which is created at such a point belongs to the rail line which creates it, while the traffic which is fostered upon the coast is the prey of every vessel which sails the sea. Carriers in the future will doubtless adopt this method and will voluntarily make rates to interior points like Spokane which will enable those localities to compete with coast cities. Admitting, however, that it is for those defendants to say to what extent, if at all, they will meet these competitive conditions, they are not at liberty in meeting them to adopt such a policy, nor to execute the policy adopted in such a manner as to unjustly discriminate between different localities. They may, perhaps, determine whether they will apply the coast rate which is fixed by water competition at the interior point, but if they apply it at one point they must apply it at others which are similarly situated; they cannot, in the absence of some sufficient reason, give Chicago that rate and re-

fuse it to St. Louis and Kansas City. They cannot so adjust their whole tariff scheme, upon the plea of water competition, as to concentrate in these coast cities commercial and transportation advantages to which their mere location does not entitle them, and that in substance is the effect of the present rate adjustment.

Considering the question broadly with reference to the situation in the Spokane case in all its aspects, it cannot be said that the legitimate effect of water competition upon the Atlantic seaboard may not be to reduce the rail rate from interior points.

The Intermountain Cases really embraced two controversies, one involving traffic shipped from the east to points between the Missouri River and the Pacific coast, and the other, traffic shipped from the east to Spokane and Walla Walla, Wash. In both cases the Commission established a proportionate relation to be maintained between the lower rate for the longer haul and the higher rate for the shorter haul upon the basis of certain percentages which were fixed with reference to defined rate zones.

The Commerce Court enjoined the enforcement of the orders, 191 Fed., 856. The Commission appealed. The Supreme Court reversed the decrees of the Commerce Court and sustained the validity of the Commissioner's orders.

The Supreme Court considered the cases from a fourfold viewpoint, namely, (1) the meaning of section 4 as amended; (2) its constitutionality; (3) the jurisdiction of the court; and (4) the validity of the orders in the light of the statute as interpreted.

On the first point Mr. Chief Justice White, speaking for the court said:

"It is certain that the fundamental change which

it (the amendment of 1910) makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property,' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that, in substance, the amendment intrinsically states no new rule or principle, but simply shifts the power conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of reviewing function. In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so in the absence of some authority would not only be inimical to the provisions of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and

obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved; and if not, is, in any event, by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections."

The constitutional objection was that the fourth section constitutes a delegation to the Commission of legislative power which Congress was incompetent to make. The court held this contention to be without merit.

The principal objection to the jurisdiction of the court rested upon the assumption that the order of the Commission refusing to grant the request of the carrier made under section 4 was purely negative, and hence not subject to judicial review. The court held that "while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist."

As to the validity of the orders under the fourth section as amended and as thus construed, the court states the carriers' objection and answers it in this language:

"The main insistence is that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix

a reasonable rate to the intermediate points; that is to say, then under the power transferred to it by the section as amended, the Commission was limited to ascertaining the existence of competition and to authorizing the carrier to meet it without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it, and with the plain purpose and intent manifested by its enactment. * * * As the prime object of the transfer was to vest the Commission within the scope of the discretion imposed and subject in the nature of things to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act, with authority to consider competitive conditions and their relation to persons and places, necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other and the establishment of the basis by percentages was within the power granted."

U. S. vs. A. T. & S. F. Ry. Co., 234 U. S. 476.
U. S. vs. U. P. R. R. Co., 234 U. S. 495.

Since it is neither appropriate nor beneficial to inject into this work conjectures or controversial arguments in connection with pending adjustment of fourth section violations involved in recent rate advance cases and readjustments of rates between tap lines and industrial railroads and trunk lines, no comment will be indulged in at this time upon such matters now pending before the Interstate Commerce Commission.

Commodity Rates to Pacific Coast Terminals, 34 I. C. C. Rep. 13, 17.
Eastern Fruit Growers' Assn. vs. B. & O. R. R. Co., 33 I. C. C. Rep. 343, 347.
Rates on Grain and Grain Products, 33 I. C. C. Rep. 613, 618, 620.
Fourth Section Violations in the Southeast, 32 I. C. C. Rep. 61, 71.

- Rates on Sugar, 31 I. C. C. Rep. 511, 515, 516, 517, 518, 522, 523, 524, 525, 526, 527, 531.
 Rates on Sugar, 31 I. C. C. Rep. 495, 503, 508.
 Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 160, 185, 188, 206, 266, 273, 277, 279, 291, 297, 304, 305, 308, 310, 316, 325, 326, 328.
 Brownsville, Tex., Class and Commodity Rates, 30 I. C. C. Rep. 479, 482, 486.
 Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 522.
 Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep. 621, 628, 630, 632, 633.
 American Insulated Wire & Cable Co. vs. C. & N. W. Ry. Co., 26 I. C. C. Rep. 415, 416.
In re Lumber Rates, 25 I. C. C. Rep. 50, 59, 61.
 Bowling Green Business Men vs. L. & N. R. R. Co., 24 I. C. C. Rep. 228, 239, 240.
In re Transportation of Wool Hides, and Pelts, 23 I. C. C. Rep. 151, 178.
 City of Spokane vs. N. P. Ry. Co., 21 I. C. C. Rep. 400, 423, 424, 425, 426.

See also:

- R. R. Commission of Nevada vs. S. P. Co., 19 I. C. C. Rep. 238, 249, 250.
 City of Spokane vs. N. P. Ry. Co., 19 I. C. C. Rep. 162, 169, 174.
 A. T. & S. F. Ry. Co. vs. U. S., 191 Fed. Rep. 856.

The Commission has many times held that discrimination may be justified by water competition, subject however, to the limitation that the discrimination must not exceed the real effect of the competition. In other words, ordinarily the Commission will not, by relief from the fourth section, authorize the carriers to go any farther in meeting water competition than is necessary to meet the competition afforded by actual water routes, because to do so would be to give a permanent advantage to some localities to the disadvantage of competing localities. And where a carrier has once chosen to make a lower rate to meet water competition it is not estopped from thereafter increasing that rate, provided the new rate is just; reasonable and nondiscriminatory, and the requirements of section 4 are observed.

In Coal & Coke Rates in the Southeast, 35 I. C. C. Rep. 187, 196, it was repeated from 28 I. C. C. 467, 470:

"The extent to which the carrier shall lower its rate to meet anticipated competition is a matter primarily for its decision, and should it later raise the rate the sole question for our determination is whether that increased rate is just and reasonable for the service performed, and not whether the carrier should be compelled to keep its rates on a probable unremunerative basis upon which it voluntarily put itself to meet special conditions."

It has been uniformly held by the Commission that it is for the carrier to determine whether or not it will meet water competition. If it elects to discontinue this practice at any point and increase its rates the Commission is concerned only in the question of whether or not the increased rates are just, reasonable and proper.

Rates on Scrap Iron to Gulf Ports, 33 I. C. C. Rep. 668.

To this latter point the Commission gave consideration in its report in **Transcontinental Rates**, 40 I. C. C. Rep. 35, 39, wherein the Commission ordered a readjustment of the terminal rates to Pacific Coast points because of the withdrawal of the principal steamship lines from the Panama Canal service, saying:

"No change in rates such as is here sought should be made precipitately. Yet necessary and proper changes in rates must be effected from time to time, although such changes may result in hardship and loss. The coast cities also contend that as some of the rates to Pacific coast points and the rates on California products from the California ports to the Atlantic seaboard have been reduced since June 18, 1910, on account of water competition, they can not be again increased under the present circumstances

because such increases are prohibited by that portion of the fourth section of the act as amended which reads as follows:

‘Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.’

“This section of the act must, of course, be construed in the light of the other sections, and in view also of the purpose and intent of this particular section. One of the primary purposes of the act to regulate commerce was to preserve and promote and not to destroy competition between carriers. The purpose of this clause was the preservation of water competition. It was intended to act as a restraint against rail carriers reducing their rates between competitive points to such a level as to render the water service between such points unremunerative and unattractive. Should a rail carrier operating a route between competitive points in competition with a water route depress its rates, without authority of the Commission, to a level so low as to drive the water carrier from the field, the rail carrier is prohibited from thereafter increasing its rates except by permission of this Commission, and such permission can not be extended unless reasons for the proposed increases are shown other than the elimination of the water competition. In the situation here considered, however, the carriers sought authority from this Commission to make the reductions which have been made. Hearings were held and careful examination was made of each proposed rate, both to the coast points and to and from intermediate points. The Commission had to determine the following facts:

"(1) Were the proposed rates to the coast points warranted by the competition there existing?

"(2) Were the lower terminal rates proposed such as to more than cover the out of pocket costs of the rail carriers that performed the service?

"(3) Were the higher rates proposed to intermediate points and in the case of the eastbound rates from intermediate points, reasonable *per se*, and not unjustly discriminatory against such points?

"The first two questions being answered in the affirmative by the testimony offered, the Commission itself fixed the relative measure of the rates to intermediate points in the case of the westbound rates and authorized the relative measure of the rates from intermediate points proposed by the carriers in the case of the eastbound rates under the conviction that the rates to and from intermediate points so proposed did not unjustly discriminate against such points. The carriers have proceeded in this case under the authority of the Commission to make only such rates to the coast points as would enable them to compete for and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights. The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission.

"If, however, in the exercise of our judgment upon the facts presented in this case we had permitted the rail carriers to establish lower rates to the coast points than the actual competition there existing warranted, and upon hearing with proper notice to all interested parties it was subsequently shown that the effect of our order was to permit the continuance of rates to such points lower than were warranted by competition there existing, shall it be said that this condition must be perpetuated? To continue rates to the coast points that are lower than are

necessitated by the actual water competition and higher rates to intermediate points and to other points over similar distances under like circumstances, is to perpetuate a discrimination that is unjust. The second and third sections of the act forbid all unduly preferential or unjustly discriminatory rates and practices. The portion of the fourth section above quoted does not repeal or annul any part of the second and third sections of the act to regulate commerce. If a coast point is receiving a lower rate than that to which it is lawfully entitled by the conditions there existing it is a preference at that point that results in prejudice against higher rated points whether intermediate thereto or not. Furthermore, the primary purpose of this portion of the fourth section being to preserve and promote competition by the water carriers, it must be so construed as to give effect to that purpose. If the rail rates between the two coasts, established in the light of conditions then existing, should, through such a complete change of conditions as that which has so recently come about, be now at a level so low as to make the service between the two coasts unattractive to the boat lines, should they be readjusted to a basis that will attract the water carriers back to the service and the primary purpose of the section be achieved or should they be held at the present level and the legislative purpose to a certain extent be defeated?

"That portion of the fourth section which provides that—

'the Commission may from time to time prescribe the extent to which the carrier may be relieved from the requirements of this section—'

seems to contemplate a certain flexibility in the rates at the competitive points varying with the degree of competition there found, in connection with which

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rates relief may be afforded according to the degree and extent of the competition."

- Major Stave Co. vs. M. G. & G. R. R. Co., 39 I. C. C. Rep. 573, 576.
- Casey-Hedges Co. vs. C. N. O. & T. P. Ry. Co., 39 I. C. C. Rep. 569, 571.
- Oklahoma Cotton Seed Crushers' Assn. vs. M. K. & T. Ry. Co., 39 I. C. C. Rep. 497, 502.
- Hessig-Ellis Drug Co. vs. L. & N. R. R. Co., 39 I. C. C. Rep. 459, 463.
- Gile & Co. vs. S. P. Co., 39 I. C. C. Rep. 193, 197.
- Memphis Frt. Bu. vs. St. L. I. M. & S. Ry. Co., 39 I. C. C. Rep. 224, 248.
- City of Memphis vs. C. R. I. & P. Ry. Co., 39 I. C. C. Rep. 256, 269.
- Bituminous Coal to Mississippi Valley Territory, 39 I. C. C. Rep. 378, 389.
- Texarkana Frt. Bu. vs. I. C. R. R. Co., 38 I. C. C. Rep. 55, 58.
- National Rolling Mill Co. vs. C. & E. I. Ry. Co., 38 I. C. C. Rep. 108, 109.
- Through Rates to Points in Louisiana and Texas, 38 I. C. C. Rep. 153, 163.
- Mission Brewing Co. vs. A. T. & S. F. Ry. Co., 38 I. C. C. Rep. 171, 173.
- Rates on Iron and Steel Articles, 38 I. C. C. Rep. 237, 240.
- Lumber Between Points in Western Trunk Line Territory, 38 I. C. C. Rep. 370, 376.
- Class and Commodity Rates Between St. Louis, East St. Louis, and Ohio River Points, 38 I. C. C. Rep. 411, 418.
- Bituminous Coal from Points on Pa. R. R. Co., 38 I. C. C. Rep. 658.
- Shippers of Eastman, Ga., vs. So. Ry. Co., 38 I. C. C. Rep. 672, 673.
- Rates on Buckwheat and Corn Flour, 37 I. C. C. Rep. 364, 365.
- Official Classification Ratings, 37 I. C. C. Rep. 166, 185.
- Coal to Rhode Island Points, 37 I. C. C. Rep. 650, 651.
- Shelbyville Business Men's Assn. vs. L. & N. R. R. Co., 37 I. C. C. Rep. 675, 678.
- Pacific Motor Supply Co. vs. A. T. & S. F. Ry. Co., 37 I. C. C. Rep. 703, 705.
- Transcontinental Commodity Rates, 32 I. C. C. Rep. 449, 455.
- Lebanon Commercial Club vs. L. & N. R. R. Co., 28 I. C. C. Rep. 301, 304.
- Texarkana Frt. Bu. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 569, 583.

§ 8. Transcontinental Rates.

In its annual report for 1916 the Interstate Commerce Commission reviewed the transcontinental rate situation as follows:

"The matter of greatest interest and importance coming under the fourth section of the act to regulate commerce has been the question of the proper adjustment of transcontinental rates. Class rates from eastern points of origin to the Pacific coast and intermediate points are at present in strict accord with the requirements of the long-and-short-haul clause of the fourth section. With reference to commodity rates from eastern points of origin to the Pacific coast and to points in the intermediate territory, particularly the intermountain territory, the situation is more complex. These commodities are divided into three general classes, known, respectively, as schedule A, B, and C commodities. Those included within schedule A move under rates which, like the class rates, accord strictly with the requirements of the long-and-short-haul clause. The commodities included under schedule B are those which, generally speaking, are adapted to transportation by either rail or water. The rates on such articles for many years have been influenced to an appreciable degree by the rates made by the water carriers from the Atlantic coast to the Pacific ports. Upon these commodities several years before the opening of the Panama Canal the Commission authorized the carriers to continue lower rates from eastern territory to the Pacific coast ports than to intermediate territory. From points of origin on and west of the Missouri River the rates on these articles to the Pacific coast are in accord with the long-and-short-haul provision of the fourth section; but from Chicago, Pittsburg, and New York territory the rates to intermediate points may exceed by 7, 15, and 25 per cent, respectively, the rates carried to the Pacific coast ports. The orders granting the relief referred to

were attacked by the carriers, and the Commerce Court enjoined their enforcement. The cases were appealed to the Supreme Court, and that court sustained the validity of said orders in their entirety. **United States et al vs. A., T. & S. F. Ry Co. et al.**, 234 U. S. 476, and **United States et al. vs. Union Pacific R. R. Co.**, 234 U. S. 495.

"Commodities included within schedule C comprise articles which are produced and manufactured in Atlantic seaboard territory and in the middle west, which lend themselves in a preeminent degree to transportation by water, and which normally would move in large bodies from Atlantic seaboard to the Pacific coast; and upon these the ordinary rates by water are particularly low. Upon these schedule C commodities, by order entered April 30, 1915, we granted a greater degree of relief than is accorded to schedule B commodities in that rates to intermediate points were permitted to exceed rates to the Pacific coast ports to a greater extent than on schedule B commodities. The carriers were, however, restricted in their charges to intermediate points by certain prescribed maxima. The carriers were also restricted in the application of terminal rates on these articles to the ports of call, at which the Atlantic-Pacific steamship lines and independent steamers delivered their freight.

"The opening of the Panama Canal was almost coincident with the beginning of the European war. Through the latter half of the year 1914 and the first half of the year 1915 the amount of traffic moved by water via the canal between the two coasts of the United States was practically double that which had moved by water in any preceding year. The rates applied by these water carriers for the transportation of California products, barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports to Atlantic seaboard points were so low that the all-rail carriers and the carriers operating rail-and-water lines through Galveston, Tex., and New

Orleans, La., found themselves threatened with the loss of a large part of their traffic in these articles which had theretofore moved via these routes. The carriers operating rail-and-water routes through Galveston and New Orleans accordingly petitioned for authority to establish rates on these articles from Pacific coast ports to Atlantic seaboard ports which would hold to their lines some part of this traffic which at that time was being increasingly carried by water. After hearing and investigation we authorized these lines to establish carload rates from Pacific coast ports to Atlantic seaboard ports of 40 cents per 100 pounds on barley, beans, canned goods, and asphaltum; 60 cents per 100 pounds on dried fruits; and 45 cents per 100 pounds on wine; and to maintain higher rates from intermediate California points to the same destinations.

"During the latter part of the year 1915 the Panama Canal by reason of slides was closed to traffic. In the meantime the enormous demand for ships in the carrying trade between the United States and foreign countries and in the commerce of foreign nations was such as to divert thereto a large percentage of the ships formerly plying between the Atlantic and Pacific coasts of the United States through the canal. While the Panama Canal was closed the American-Hawaiian Steamship Company and the Luckenbach Steamship Company, which were the principal companies engaged in the traffic between the Atlantic and Pacific coasts of the United States, leased many of their ships for varying periods to traverse other routes and the present situation is that there are now no regular steamship lines and relatively few ships under charter engaged in the service via the canal between the two coasts of the United States.

"It was under these circumstances that petitions were filed by the Nevada Railroad Commission and the Spokane Chamber of Commerce in March, 1916, averring that the necessity which had theretofore

been deemed to warrant the maintenance of lower rates to Pacific coast ports than to intermediate points no longer existed, and that the further maintenance by the rail carriers and the rail-and-water carriers through Galveston and New Orleans of lower rates from eastern defined territories to Pacific coast ports than to intermediate points constituted undue preference of the Pacific coast ports and undue prejudice against intermediate points paying higher rates.

"We thereupon reopened the fourth section applications as to rates on schedule C commodities from eastern defined territories to the Pacific coast ports, and on barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports via Galveston and New Orleans to Atlantic seaboard ports. After full hearing and argument we ordered the carriers to readjust the rates on schedule C commodities under the rules and restrictions provided for schedule B commodities and ordered the readjustment of the rates on barley, beans, canned goods, asphaltum, dried fruits and wine from California ports and intermediate points to the Atlantic seaboard in strict accord with the requirements of the long-and-short-haul clause. Tariffs were filed by the carriers in response to the order purporting to be in compliance therewith. The tariffs filed by virtue of this order contained many proposed increases in the rates to and from the Pacific coast ports. They also included increases in many minimum weights and changes in less-than-carload commodity items. Protests were filed on behalf of shippers not only on the Pacific coast but equally by shippers in other places, and particularly in the middle west, against the increased rates proposed in the tariffs so filed. We suspended the schedules containing these rates for further investigation until December 30, 1916. Subsequent to the suspension of these rates the Spokane Chamber of Commerce filed a petition averring that in consequence of the entire disappearance of water competition between the Atlantic and Pacific coasts of the

United States there remains no justification whatever for the maintenance of rates on any commodity from eastern defined territory to Pacific coast ports lower than the rates to intermediate points. We thereupon reopened the fourth section applications relating to the rates on schedule B commodities from eastern defined territories to Pacific coast ports and assigned for hearing in November and December, 1916, at Chicago, Ill., Salt Lake City, Utah, San Francisco, Cal., Portland, Ore., and Spokane, Wash., all of the applications asking permission to carry rates on commodities from and to the Pacific coast lower than the rates on like traffic from or to intermediate points.

"The situation has so radically changed by reason of the virtual cessation of compelling water competition via the canal as to put in issue rate relationships fully justified when established but now alleged to be unduly preferential to coast cities and unduly prejudicial to interior points. It is our design to attain, if possible, a permanent basis for the adjustment of this perplexing problem which has been so provocative of complaint; and reach such a solution without any discouragement to the just relative utilization by all the people of established transcontinental avenues of transportation, by rail as well as by the canal.

"Various phases of this section of the act, as well as the interpretation and application thereof, have been referred to in our previous reports. It has also heretofore been shown that 5,030 applications for permission to continue existing departures from the general requirements of this section were filed within the period prescribed in said section, to wit, on or before February 17, 1911. Many of these applications were comprehensive in their nature, embracing complex rate situations covering practically all traffic and all points in the carrying trade in which the applicants participated. In numerous instances parts of such applications have been disposed of after hearing or in connection with other proceedings involv-

ing the same rates or territories. Some of these applications still await disposition.

"Experience has shown that as to a large number of the original applications the carriers were continuing in their tariffs fourth section departures in the rates protected by said applications that could not be defended, or which, in frequent instances, they no longer desired to defend. Therefore, in order to bring such rates into conformity with the law without further delay, we by circular letter dated April 4, 1916, requested the carriers to check over and analyze those applications which had not already been heard with a view to withdrawing such as they could not properly justify, and to report to us the I. C. C. numbers of such applications so that denial orders might be issued and proper disposition made of the applications. The carriers generally cooperated with us in this matter, and as a consequence their tariffs are being revised with this end in view. As the result of this letter many applications have already been disposed of and a large number of fourth section departures have been eliminated from the tariffs of the carriers.

"In addition to the original applications referred to, 5,855 special applications have since been filed requesting fourth section relief in order that the carriers might make changes in rates to meet changed commercial and transportation conditions. Practically all such applications have been responded to by special orders.

"During the period November 1, 1915, to October 31, 1916, inclusive, the number of special applications received was 524, a decrease of 149 as compared with the preceding year. During the same period 1,028 fourth section orders were entered, of which 662 were permanent in character and 366 for temporary relief. Of the 1,028 orders 577 were entered in response to applications included among the original 5,030 for authority to continue existing fourth section departures, while 451 were entered in

response to the special applications which have been filed since the receipt of the 5,030 original applications. Applications withdrawn after correspondence with carriers number 48. This is an increase of 7 applications as compared with the number disposed of during the preceding year. Total applications granted numbered 433; denied, 595.

A number of important cases have been disposed of during the past year involving intricate rate adjustments which will have the effect of bringing the rates of the carriers in conformity with the law, among which might be mentioned the following:

"In Through Rates from Buffalo-Pittsburgh Territory, 36 I. C. C. 325, the carriers are denied authority to continue through rates from Buffalo-Pittsburgh and central freight association territories to points south of the Ohio and east of the Mississippi rivers that exceed the aggregates of the intermediate rates.

"In Through Rates to Points in Louisiana and Texas, 38 I. C. C. 153, the carriers are denied authority to continue through rates from all points east of the Mississippi River to points in Louisiana and Texas that exceed the aggregates of the intermediate rates.

"In Class and Commodity Rates, 38 I. C. C. 411, we disposed of the applications of numerous carriers operating both north and south of the Ohio River in the territory lying between St. Louis, Mo., and East St. Louis, Ill., on the one hand, and the Ohio River crossings on the other, and between the various Ohio River crossings themselves. This case involved the class and commodity rates via many different routes and a large number of fourth section deviations were involved. Relief was granted to certain lines operating between the river points, and in other cases of less substantial merit it was denied.

"Rates on Bituminous Coal, 36 I. C. C. 401, and Bituminous Coal to Mississippi Valley Territory, 39 I. C. C. 378, disposed of many applications involving

rates on bituminous coal from mines in Illinois, Kentucky, Tennessee, and Alabama to points in Mississippi Valley territory lower than rates contemporaneously in effect to intermediate points.

"Hearings and investigations have been had on over 500 applications of the carriers in the middle west during the past year. These applications are being disposed of by orders without formal reports, in the interest of expedition, the carriers having waived their rights to formal reports.

"Hearings have also been had respecting applications of the carriers relating to commodity rates from points in Illinois, Indiana, Iowa, Michigan, Missouri, and Wisconsin to Ohio River crossings which are lower than rates contemporaneously applicable on like traffic from intermediate points. These matters are now under consideration."

§ 9. Historical Review of Water Competition Influences on Transcontinental Rate Structures.

Water competition in its effect upon rail transportation rates is of a two-fold nature, i. e., direct water competition and potential water competition. Water transportation is the cheapest form of commercial carriage known to civilized man, and where water transportation service actually exists it has a compelling effect in depressing rail transportation rates. It is obvious that a railroad cannot share in traffic which may be and actually is being transported by water, unless it relatively meets the low water rate.

In no instance in the transportation and commercial history of the country has the effect of both actual and potential water competition been so grievously felt as in the development of our transcontinental rate system.

In 1869, when the Union Pacific and Central Pacific railroads were united at Promontory Point, Utah, there

was no such thing as a transcontinental rate, excepting as it was made up of a combination of locals. In fact, at that time it was not expected, that there would be any real competition between the transcontinental railroad lines and the ocean carriers. The original purpose of constructing the Central Pacific road, so far as its California promoters were concerned, was to carry eastward from the Pacific coast to the interior, and the rates made across the Sierra Nevada Mountains were made to meet and overcome the then existing competition of the mule team. It was not the primary purpose to extend this road across Nevada, but only to furnish a means of communication between the city of Sacramento and the rich mining towns along the ridge of the Sierra Nevadas and on their eastern slope. Confessedly it was the lure of the government subsidy which induced the extension of this line to the eastward. The purpose of the Central Pacific was to act as the distributor of the ocean-borne freight which was brought into the Bay of San Francisco by sailing ship coming in around the Horn; and for some time following the establishment of this through transcontinental route no serious effort was apparently made to induce the all-rail overland movement of traffic, which did not require especial or express service.

The first through rate published was an open rate of \$8 per 100 pounds, first class. This rate was scaled down, being lower from Pittsburg, and still lower from Chicago and other points. When competition was begun with the clipper ships out of New York, class rates were reduced to a \$6 scale, and these were graded from the east westerly. Commodity rates were also at this time established in an effort to take from the ships important volumes of business. These open rates, however, were found to be unsuccessful in developing any considerable

amount of transcontinental business, owing to the fact that whatever rates the railroads made were met by the boat lines. Accordingly in 1877 the Union Pacific and Central Pacific, which worked together in this matter, instituted what is known as the special contract system, under which they published two rate sheets, one known as the "white list" and the other known as the "pink list." The white list contained the open or public rate; the pink list contained the contract rate. Contracts were made with individual shippers that if they would give to the railroad line all of their traffic for a year to the exclusion of ocean carriers they would have a rebate down to the figure fixed in the pink list.

The battle began in earnest at this time between the railroads and the ocean lines. Whatever competition there had been before was insignificant when compared with that which followed the year 1877. At that time the railroad interests evidently determined upon a vigorous and concerted action to meet and control this competition. The jobbers of the Pacific coast were individually dealt with; their waybills by the water lines were furnished to the railroad, from which it estimated the volume of traffic and the amount of charges paid thereon by the shipper. Upon this basis a rate was made by adding to the ocean charge an additional allowance for the saving in insurance arising out of movement by rail, the saving in interest upon the value of the freight, and an additional amount for the comparative certainty of delivery and expedition. Different rates apparently were made to different shippers. This secret contract system, by which a rate was made to each individual, firm, or shipper, was a logical application of the principle that the carrier should charge what the traffic would bear. For several years this system was successfully pursued with increasing

advantage to the railroads; but under the pressure of strong popular agitation, and owing to the fact that the shippers were in many cases found to have broken faith, the railroads determined upon again publishing but one rate. To arrive at this rate they adopted a policy of "harmonization," as it was termed and averaged the rates upon various commodities which had been charged to various shippers and made a new schedule of rates, from which they varied as emergency might require or expediency advise by the current method of rebating.

The Panama route had open and operated since the early days of the rush to the gold fields. This route was in the control of the Pacific Mail Steamship Company. In 1871, hardly two years after the opening of the transcontinental rail route, the Union Pacific and Central Pacific railroads entered into an agreement with the Pacific Mail, buying its space at an agreed figure. This arrangement was continued until 1881, when the steamship line was turned over to an association known as the transcontinental association, which continued the arrangement until 1893, so that during this period the Panama route offered no serious competition to the rail lines.

Throughout this period of competition between ocean and rail lines we find this interesting rate condition to have existed: Class rates to Pacific coast terminals increased with the distance and were higher from Atlantic seaboard points than from interior points; commodity rates, however, which were created to meet special conditions at the seaboard—the weapons fashioned for the control of the clipper ship—were lower at the ports than at the interior points. In the language of Mr. Luce, of the Southern Pacific—

"Commodity rates were scaled up from the seaboard in the first instance, but the class rates were

scaled down from the seaboard. There was always a higher class rate from New York than from Chicago, but often a lower commodity rate from New York than from Chicago."

In 1883 a new competitor entered the field—the Sunset-Gulf route, a water line from New York to New Orleans owned by and connecting with the Southern Pacific line from New Orleans to San Francisco. This new line was looked to by the carriers generally to "take care" of water competition.

It is the estimate of the Southern Pacific that of all the traffic moving from the Atlantic seaboard to California from 1885 up to 1891 the Sunset-Gulf route carried from 75 to 90 per cent, and of the balance practically all went by rail. The aggressive policy of the Southern Pacific Company in instituting a water line of its own between the Gulf and the Atlantic drove its water competitors out of the field and took from the rail lines all but the most insignificant proportion of transcontinental traffic. Those were the fine free days when "all sorts of rates could be had and all sorts of tariffs could be found."

By the year 1885 competition by sea was not more than nominal. In that year, however, the Santa Fe, being completed to Los Angeles, came into the field claiming its share of transcontinental business destined to its new terminal, California. Up to its coming, and for some years prior, commodity rates had been graded up from New York; that is to say, the rates from Pittsburg territory to California, and from Chicago to California, were higher than from New York. The theory of the rail carriers was that they should meet the competition at the point where the competition actually existed—at the seaport. But the Santa Fe had its eastern terminus in Chicago. It found the Sunset-Gulf route carrying practically all of

the Atlantic seaboard business at rates below the all-rail rates—at any rate that it chose to fix. In its view it was all well enough for the Southern Pacific to send out from the Gulf its own boats that would drive all rivals from the ocean, but because it had done this service to the rail carriers it was not to follow that all the traffic was to remain in the possession of the Southern Pacific. Whatever rates, therefore, the Sunset-Gulf route chose to make at New York the Union Pacific and Santa Fe declared they would make from Chicago. This determination of railroad policy was given the name of “market competition.” It was said that the great middle west was building up and should have its opportunity to compete with the Atlantic seaboard for the developing trade of California. The Santa Fe did not reach New York; the Southern Pacific did; the Santa Fe would give to Chicago and to St. Louis and to Kansas City the same opportunity to feed and clothe the people of California that the Southern Pacific gave to the people of New York and Boston. Then followed an interesting rate war, which culminated in 1887 in the installation of a new set of graded rates, this time scaling lower as they receded from the Atlantic seaboard.

We find, then, with the first transcontinental tariffs that were filed with the Commission in 1887, a \$3 first class rate from New York to San Francisco, a lower rate obtaining from Pittsburg, a still lower rate from Cincinnati, and so by steps to the Missouri River. These graded rates remained in effect until 1889, when we find the first evidence of the institution of a great eastern blanket of class rates. This was at first not formally recognized in the tariffs, but was effected by eastern carriers through a system of rebates from the published rates.

Things appear to have gone peacefully for the next few years. The only serious competition which the railroads

met by water was that of the Southern-Pacific-Sunset line from New York, which apparently applied from the New York piers, whatever the all-rail rates were from Chicago.

In 1892, San Francisco merchants were roused to activity by an increase in the transcontinental rates, and instituted a boat line of their own. This brought on another rate war, in which the merchants lost heavily, and rates were reduced by the rail lines to absurdly low figures. The lines east of Chicago and those west fell out over the division of the joint through rates, and for a time there were no joint through rates extending from points farther east than Chicago, and blanket rates were made by the western carriers from Chicago, Mississippi River, and Missouri River points. Later, the transcontinental lines came to an agreement with their eastern connections as to a new basis of divisions and a new scheme of rate making.

Thus we come to the year 1896, at which time the blanket system at present obtaining was first authoritatively announced. This blanket extended from the Missouri River to the Atlantic seaboard. We hear very little of water competition for the next three or four years. In 1900, however, the American-Hawaiian Steamship Company established its first steamer line through the Straits of Magellan. In 1900 also, as we have already seen, control of the Pacific Mail was purchased by the Southern Pacific Company. Neither one of these facts seems to have disturbed transcontinental rail rates.

In 1906 another step forward was made in the matter of water competition by the opening of the Tehuantepec route. The American-Hawaiian Company, under an arrangement made with the Mexican Government and with the sugar planters in the Hawaiian Islands, instituted the most satisfactory service which up to that time had obtained between the Atlantic and Pacific seabords

by water. East-bound tonnage was furnished by Hawaiian sugar, and west-bound tonnage was gathered at the Atlantic seaboard.

In 1907 the volume of west-bound business carried to Pacific coast terminals via this route was 112,395 tons; in 1908, 117,203 tons; in 1909, 204,000 tons; and in 1910, 239,500 tons. The total volume of transcontinental tonnage was, a few years ago, estimated by the carriers at 3,000,000 tons per annum, while the total water-borne traffic was about 10 per cent of this figure. Inasmuch as the traffic of the country increases at the rate of nearly 10 per cent per year, it would appear that in recent years ocean competitors of the transcontinental rail lines have been enabled to secure a total tonnage of approximately the normal increase in west-bound transcontinental freight for a single year.

We have thus traced the history of this protracted struggle between the ocean and the land carriers that we might clearly appreciate the strategy of the railroads and its effect upon the ocean-borne traffic. To meet the competition of the railroads the tendency of the ocean carriers has been to shorten the time consumed in passing by water from coast to coast. The clipper ship has been forced to give way to the steamship and the steamship has been compelled to transship by rail a portion of the distance. The routes by way of Cape Horn and the Straits of Magellan have been virtually abandoned. For nearly forty years the Panama route has been under railroad control. When an attempt was made to reestablish this route as a vital competitor, the railroads used their own ocean-and-rail line to eliminate it from the field.

In the light of this history it is not to be gainsaid that the transcontinental lines must give consideration to sea

competition. For thirty years and more their effort has been to "neutralize and control" such competition.

The railroads, moreover, must now meet with a competition by water more intense than any that they have heretofore suffered, for another route, one more important, searching, and determinative in its effect upon railroad rates than any other, has been opened—a route all water by way of the Panama Canal. The cutting of this canal in effect brings the Straits of Magellan 3,500 miles to the northward, and with modern steamships San Francisco by water is removed from New York but fourteen days.

There have been two periods of intense water competition since the year 1887, when the Act to Regulate Commerce went into effect. One following the establishment of the Merchants' line via the Panama route, the other immediately following the establishment of the Tehuantepec route in 1906. The effect on commodity rates out of New York of the establishment of the Merchants' line of steamships has already been adverted to. In order to ascertain the effect upon commodity rates of the establishment of the American-Hawaiian line the Commission secured from the carriers a statement of the fluctuations in their rates since the year 1906, from which it appeared that notwithstanding the presence of what purported to be active water competition, commodity rates by the rail carriers had been increased rather than lowered during that period. Out of 1,535 commodity rates compared by the carriers, it appeared that no change had taken place since December 1, 1906, as to 696 of such commodities, reductions had been effected in 287, advances and reductions as to 132, and advances as to 418. Of the items increased, the rates on 318 commodities were increased from the whole eastern blanket. The reductions in the greater part were effected by taking single articles from the classification and giving them to commodity rates from all points of origin.

It was noticeable how through the years this blanket of class and commodity rates had been drawn eastward from the sea-competitive point until it extended two-thirds of the distance across the continent. How had the carriers justified this blanket to the coast but not to intermediate points? Long before the blanket had been stretched to its western extent the communities intermediate between its eastern border and the Pacific made protest against the injustice that was being done. For nearly a quarter of a century this complaint had been heard and had ceased at times only to be revived with greater earnestness. A line of railroad policy which leads to such result may be presumed to have in it something artificial and unnatural. That which appeared as unnatural in this situation was the rates which were said to be less reasonable because compelled by ocean competition. It did Reno an injustice for the transcontinental lines to give San Francisco a rate from New York that enabled them to carry traffic as against the ocean carriers out of New York. By such policy Reno secured the advantage of her proximity to San Francisco, an ocean terminus. If the ships out of New York found it profitable to pay the railroad rate from Pittsburgh to New York in order to take the freight from the transcontinental lines, a rail rate which would meet this competition at Pittsburgh was permissible. It was fairly established that the influence of water competition did not cease at the Pittsburgh-Buffalo line, but extended westward over their lines, but one could look in vain throughout the records of Commission for twenty years to find any but the most fragmentary evidence that sea competition extended to Chicago. On the contrary, it was the admission of the carriers themselves that the rates which they made from Chicago to the Pacific coast terminals were established in order that the manufacturers and the jobbers of the west might

compete on a level with the jobbers and manufacturers who had the advantage of a location at the Atlantic seaboard.

In the St. Louis case—Business Men's League of St. Louis vs. A. T. & S. F. Ry. Co., 9 I. C. C. Rep. 318—argued before the Commission some ten years ago, the following interesting testimony was offered by Mr. Stubbs, vice-president of the Southern Pacific system:

"It is the question as to whether the rates are in themselves reasonable, and, if below that point, then the question is according to our judgment, and we think the ruling of the Interstate Commerce Commission originally and the law, or the proper construction of it, just in the degree that they can avail themselves of the same competitive conditions that New York can, just in that degree and no further they are entitled to the New York rate. That is the law as it has been expounded to me by our own counsel, and we have had three general counsels since the law has been enacted. * * * If Chicago being an interior point is entitled to a lower rate to San Francisco or the same than from New York why is not Reno, Nev., that is nearer San Francisco and much nearer the ocean—can much more easily avail itself of ocean competition—why is not it entitled to a lower rate than San Francisco on the goods it receives from New York? It is entitled to it as we read the law. If Reno is entitled to a lower rate from New York or the same rate then that is true of every point east of San Francisco in the state of California between here and New York, and the result is that the entire fabric, local and through, is brought down to the level of the competitive rates between New York and San Francisco compelled by the sea route. * * * It is said that you can make one rule apply on shipments from a point to a point where water competition exists regardless of the fact whether the conditions at the initial point are governed by water competition or not, but that does

not necessarily apply to the intermediate points. That is to say, you can make the rate from Chicago to San Francisco lower than the rate from New York to San Francisco but in the application of that rule it is not necessary for you to make a rate from New York to Reno, New York being on the water, the only difference being that it is the initial point instead of the destination point in the case of San Francisco; but you do not have to make a lower rate from New York to Reno, and for that reason my friends of the Union Pacific and others think that they can make a lower rate from Chicago to San Francisco and yet charge a higher rate, as they do, from Chicago to Salt Lake City, charge a higher rate from Chicago to Denver, as they do, on many articles. That is our interpretation of the law."

The Panama Canal Act has vested in the Interstate Commerce Commission an extension of authority over the water routes plying via the canal. Jurisdiction is conferred on the Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carriers, and the Commission is empowered to institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or possibility of competition determined as provided in the Panama Canal Act, the order of the Commission being final.

If the Interstate Commerce Commission was of the opinion that any such existing specified service by water other than through the Panama Canal was being operated in the interest of the public and was of advantage to the convenience and commerce of the people, and that such extension would neither exclude, prevent nor reduce competition on the route by water under consideration, the Interstate

Commerce Commission could, by order, extend the time during which such service by water might continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules and practices of such water carrier were required to be filed with the Interstate Commerce Commission and be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as was the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, might be considered and granted thereafter.

§ 10. Local Rates in Excess of Divisions of Joint Rates Between Same Points.

It is a well recognized principle in rate making that the portion of a joint rate which a participating carrier receives may be less than its local rate for the same service. In fact, it is strongly urged that a joint rate for a through service should be less in amount than the sum of the local rates for the respective hauls of the participating carriers constituting the through route under the joint rate.

The fact that the disparity existing between divisions of through rates and local rates between the same points is considerable is not conclusive evidence of undue discrimination.

Omaha Cooperage Co. vs. N. C. & St. L. R. Co., 12 I. C. C. Rep. 250.
T. & P. R. Co. vs. I. C. C., 162 U. S. 197, 40 L. Ed. 940.

Neither is it necessarily undue discrimination if a carrier accepts as its proportion of a through rate a less sum

than it charges for a like service which is local to its own lines.

Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447, 42 L. Ed. 231.

See also:

Rice, etc., vs. W. N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 2 I. C. C. Rep. 298.

The divisions of a through rate between the carriers in a line of transportation furnish no fair or just criterion by which to measure the intermediate local rates on the same line of transportation.

McMonan et al. vs. G. T. R. Co. et al., 3 I. C. C. Rep. 252, 2 I. C. C. Rep. 604.

Local rates cannot be made the measure of what a carrier shall accept as its division of a through rate.

Lippman & Co. vs. I. C. R. Co., 2 I. C. C. Rep. 584, 2 I. C. C. Rep. 414.

See also:

U. S. vs. Tozer, 39 Fed. Rep. 369.

Chattanooga Packet Co. vs. I. C. R. Co., 33 I. C. C. Rep. 384, 392.

Detroit, etc., vs. G. T. R. Co., 2 I. C. C. Rep. 315, 2 I. C. C. Rep. 199.

Chamber of Com., etc., vs. F. & P. M. R. Co., 2 I. C. C. Rep. 553, 2 I. C. C. Rep. 393.

Poughkeepsie Iron Co. vs. N. & C. & H. R. R. Co., 4 I. C. C. Rep. 195, 3 I. C. C. Rep. 248.

Compare:

Milburn Wagon Co. vs. A. A. R. R. Co., 32 I. C. C. Rep. 582, 589.

§ 11. Express Services.

The Act to Regulate Commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads.

The act also by name recognizes the express company as a carrier subject to the Commission's jurisdiction. The Commission regards these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own. The traffic which they move should flow with the greatest possible celerity between all portions of our country, and whatever artificial barriers have been raised by the existence of separate express companies should be broken down and the rates made or practices followed should neither rest upon the foundation of a railroad's preference nor of an express company's opportunity.

In re Express, Practices, Accounts, and Revenues, 24 I. C. C. Rep. 380, 387.

In an earlier case, the Commission held that even where unjust and undue discrimination, free from criminal act, were shown to exist in their practices, it is clearly the duty of the Commission to go no further in destruction or disturbance of the business of the carrier, or in depriving the public of conveniences and facilities of value to it, than is necessary in order to remove the discrimination to the extent that it is unjust or undue.

American Bankers' Assn. vs. American Express Co., 15 I. C. C. Rep. 15, 21.

See also:

Sanders & Wells vs. Southern Express, 18 I. C. C. Rep. 415.

The right of an express company to maintain a free package pick-up and delivery service at one point, while not maintaining such a service at another point, must necessarily be controlled by the conditions existing at each place. An express service at a large commercial and man-

ufacturing town like Fall River that does not include a free pick-up and delivery would be wholly unsatisfactory. But because such a service is maintained at Fall River, where the volume of traffic is large and wagon service can be conducted economically, it by no means follows that a like service must be maintained at Bristol Ferry, where the traffic is small and the cost of keeping up a wagon service might more than absorb all the revenue. Under such circumstances it cannot be fairly said that the express company unduly discriminates against Bristol Ferry and its 73 inhabitants when it declines to maintain a free delivery there.

Phillips vs. N. Y. & B. Desp. Ex. Co., 15 I. C. C. Rep. 631, 635.

§ 12. Size or Importance of Town or City no Justification for Discrimination or Preference.

The law contemplates relatively fair rates as between different places, and the dealer located in a small town is entitled to a reasonable adjustment which will enable him to compete on an equitable basis with dealers at trade centers enjoying the benefit of competitive rates.

The mere fact that a given town has been recognized as a trade center, and is enabled by its more favorable rate adjustment to distribute in a certain territory, cannot justify the continuance of relative rates which result in undue preference.

Payne-Gardner Co. vs. L. & N. R. R. Co., 13 I. C. C. Rep. 638, 643.

See also:

Harbor City Wholesale Co. vs. S. P. Co., 9 I. C. C. Rep. 323, 331.

Holdzkorn vs. M. C. R. R. Co., 9 I. C. C. Rep. 42, 52.

D. G. H. & M. Ry. Co. vs. I. C. C., 74 Fed. Rep. 803, 822.

§ 13. Effect of Merger of Two Communities into One Municipality.

The merging of two communities into one municipality does not necessarily merge the two from a transportation point of view. In a specific case the Commission said:

“Dealing with the matter from the standpoint of transportation only, we find that the competitive traffic from the eastern seaboard through the harbor of San Pedro to Los Angeles contributes to the maintenance by these defendants of the terminal all-rail rates to the latter point, and their failure or refusal to extend these rates to San Pedro itself and to give it the benefit of what its advantageous geographical situation helps to secure to Los Angeles is an undue discrimination. It may be well to add that we have not overlooked *Commercial Club of Santa Barbara vs. So. Pac. Co.*, 12 I. C. C. Rep. 495, where substantially different conditions were shown to exist.”

Harbor City Wholesale Co. vs. S. P. Co., 19 I. C. C. Rep. 323, 331.

CHAPTER III.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DISCRIMINATION BETWEEN COMMODITIES.

- § 1. Discriminations Between Like Kinds of Traffic.
- § 2. Classification.
- § 3. Through and Local Traffic.
- § 4. Discriminations Between Foreign and Domestic Traffic.
- § 5. Quantity of Traffic.
- § 6. Consolidated Carloads of Less-Than-Carload Shipments.
- § 7. Discriminations Between Commodities Account Mode of Shipment.
- § 8. Miscellaneous Discriminations.
 - (1) Weight of Oil Barrels.
 - (2) Commissary Car.
 - (3) Refusal of Express Company to Extend C. O. D. Service to Shipments of Liquor.
 - (4) Use of Commodity.
- § 9. Classification of Telegraph, Telephone, and Cable Messages Permissible.

CHAPTER III.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DISCRIMINATION BETWEEN COMMODITIES.

§ 1. Discriminations Between Like Kinds of Traffic.

Section 3 of the Act to Regulate Commerce specifically prohibits the giving of any undue or unreasonable preference or advantage in any particular description of traffic in any respect whatsoever, or the subjecting of any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

A carrier may not dictate the purposes or use to which commodities are to be put. A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful. That is to say, the carrier has no right to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 34.

See also:

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 2.

The Commission has held that it is not an unlawful discrimination within the meaning of the Act, in favor of

"dead" freight and against live stock, to impose upon shipments of live stock a terminal charge, while no similar charge is assessed against "dead" freight.

Cattle Raisers' Assn. vs. Ft. W. & D. C. R. Co., 17 I. C. C. Rep. 513.

The provision of the third section of the Act to Regulate Commerce not only applies to relative rates on one description of traffic shipped to or from competing localities, but also to relative rates on differently described articles which are competitive in the same markets; and when carriers have established rates on articles of competitive traffic which are relatively reasonable and fair, they can not arbitrarily select particular articles of such traffic and materially raise or lower rates so established thereon without violating that provision of the statute.

Squire & Co. vs. M. C. R. Co., 3 I. C. C. Rep. 515.

The relation of rates ought to rest upon fixed and stable conditions. The fluctuations of markets are so frequent, especially as to competitive articles, and often times unexpected, that commercial considerations alone would not furnish a sufficiently stable and fixed rule for guidance in making a rate that should remain substantially permanent through all fluctuations. The Commission does not, by a fixing of rates, attempt to overcome advantages which one producer or dealer may have in his geographical location, and to produce equality between competitors in all markets. It would be a useless task, even if it had the power, to attempt to accomplish such a result. The proper relation of rates for transportation of strictly competitive articles over the same line should be determined by reference to respective costs of service ascertained with reasonable accuracy. For example: Live hogs, live cat-

tle and the dressed products of each are competitive commodities and are therefore entitled to relatively reasonable rates for transportation proportioned to each other according to the respective costs of service.

Squire & Co. vs. M. C. R. Co., 3 I. C. C. Rep. 515.

Compare:

Coxe Bros. vs. L. V. R. R. Co., 4 I. C. C. Rep. 535, 3 I. C. C. Rep. 460.

Mich. Box Co. vs. Flint, etc., R. Co., 6 I. C. C. Rep. 335, 5 I. C. C. Rep. 662.

Metp. Paving Brick Co. vs. A. A. R. R. Co., 17 I. C. C. Rep. 197.

Re Rates on Corn, 11 I. C. C. Rep. 212.

Rates vs. P. R. R. Co., 4 I. C. C. Rep. 281, 3 I. C. C. Rep. 296.

Bates vs. P. R. R. Co., 3 I. C. C. Rep. 435, 2 I. C. C. Rep. 534.

N. O. Cotton Exch. vs. I. C. R. Co., 3 I. C. C. Rep. 534, 2 I. C. C. Rep. 777.

Planters' Comp. Co. vs. Cleveland, etc., Ry. Co., 11 I. C. C. Rep. 382, 606.

Potter Mfg. Co. vs. Chicago, etc., R. Co., 5 I. C. C. Rep. 514, 4 I. C. C. Rep. 223.

Union, etc., Assn. vs. Chicago, etc., R. Co., 16 I. C. C. Rep. 405.

Howard Mills Co. vs. M. P. R. Co., 12 I. C. C. Rep. 258.

I. C. C. vs. Chicago, etc., R. Co., 141 Fed. Rep. 1003

Shimmer vs. Chicago, etc., R. Co., 14 I. C. C. Rep. 525.

Indep. Ref. Assn. vs. Cincinnati, etc., R. Co., 5 I. C. C. Rep. 415, 4 I. C. C. Rep. 162.

(These cases deal with the relation of rates on competitive commodities.)

There, of course, is no competition between certain iron articles, such as stoves and hollow ware, dog irons, wash kettles, pipe, sad irons, and lumber.

Haskew Lumber Co. vs. N. C. & St. L. Ry. Co., 34 I. C. C. Rep. 333, 336.

But cooked and uncooked cereal breakfast foods compete commercially.

Kellogg Toasted Corn Flake Co. vs. A. T. & S. F. Ry. Co., 33 I. C. C. Rep. 534, 535.

In *Menasha Wooden Ware Co. vs. C. & N. W. Ry. Co.*, 33 I. C. C. Rep. 563, 565, the Commission held that wooden pails and barrels shipped from Menasha, Wis., handles, clothespins, wooden pie plates, and wooden bowls shipped from Escanaba, Mich., and the rates cited from Escanaba were inapposite.

The fact that fabricated articles are similar cannot, standing alone, warrant a similarity of treatment where it also appears that the similar articles are in no wise competitive.

Middletown Car Co. vs. P. R. R. Co., 32 I. C. C. Rep. 185, 187.

Like kinds of lumber are in competition. Spruce is in active competition with hemlock.

Southern Hardwood Traffic Bu. vs. I. C. R. R. Co., 31 I. C. C. Rep. 6, 7.

Lumber Rates from Southern Ry. Points to Eastern Points, 31 I. C. C. Rep. 244, 250.

Sporadic instances of competition between starch and brewers grits and corn flour have existed, but the competition is not of a substantial degree.

Douglas & Co. vs. I. C. R. R. Co., 31 I. C. C. Rep. 587, 592.

Chamber of Commerce of Macon vs. C. N. O. & T. P. Ry. Co., 30 I. C. C. Rep. 477, 478.

The phrase **like kind of traffic** does not mean that the traffic must consist of identical articles but rather traffic that is of a like kind with other freight in elements of fair and just classification for the purpose of arriving at a just and reasonable rate.

N. Y. C. Board of Trade vs. P. R. R., 4 I. C. C. Rep. 477, 3 I. C. C. Rep. 417.

See also following cases relating to discrimination against traffic:

California Pole & Piling Co. vs. So. Pac. Co., 27 I. C. C. Rep. 670.

Board of Trade of Chicago vs. C. & A. R. R. Co., 27 I. C. C. Rep. 530, 535.

Acme Cement Plaster Co. vs. L. S. & M. S. Ry. Co., 17 I. C. C. Rep. 30, 36.

Southern Bitulithic Co. vs. I. C. R. R. Co., 17 I. C. C. Rep. 300.

In **Douglas & Co. vs. C. R. I. & P. Ry.Co.**, 16 I. C. C. Rep. 232, 244, the Commission, in dealing with discriminations between manufactured products in the granting of transit privileges, said:

"There is much to be said in favor of milling and manufacturing in transit, and there is much that can be said about the irregular and discriminatory practices that are invited and possible thereunder.

"There is, of course, a limit to the products which can reasonably be included in the list of those which will be transported at the raw material rate, either with or without a transit privilege. It might be reasonable to withhold transit privilege from a product that is essentially different from the raw material and from the other products of the same raw material which are accorded transit rates, as for example, a liquid product of grain; but it is clearly discriminatory to single out one or more of several milled products of grain and withhold from it or them transit privilege which is granted at that or some other competitive point to other milled products of grain of substantially similar character, value, packing, and which are transported under substantially the same conditions, attended by substantially equal risks, where there is competition between the millers of the grain either in marketing their product or in securing their material for milling."

§ 2. Classification.

The legal duty of common carriers to so classify traffic and fix charges thereon that the burden of transportation shall be reasonably and justly distributed among the ar-

ticles they carry, arises under the obligation imposed upon them not to charge unreasonable or unjust rates or to inflict any unjust discrimination or undue prejudice in any respect whatsoever; and even in cases where the need of additional revenue is apparent the carrier cannot arbitrarily select some one or more articles upon which to apply higher rates regardless of the relation which such article or articles bear to other commodities commonly offered for transportation.

C. H. & D. R. Co. vs. Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995.

§ 3. Through and Local Traffic.

Prior to the decision of the Supreme Court in the **Import Rate** case (162 U. S. 197, 40 L. Ed. 940) the Commission regarded foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions. In this construction the Supreme Court did not concur. Such a construction would seem to apply with even greater force to local and through traffic. Local traffic, however, is not of a like kind with through traffic, for the service in transporting local traffic from one point on the carrier's line to another is not identical with its service in transporting through traffic over the same rails. The difference lies largely in the cost of the service. It is obvious that the cost of moving local traffic is greater than that of moving through freight, and equally obvious that it is almost impossible to determine the difference with mathematical accuracy. Consider a single line of 100 miles of railroad with ten stations. One train starts from one terminus with through freight and goes to the other terminus without stop. The second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may

be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear on the locomotive and cars from the increased stops and in shifting cars from the main to side tracks is greater. In addition, there are the wages of the employes at the intermediate stations, the cost of insurance, etc., all elements so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. If these differences exist where there are two separate trains, it is more so when the same train carries both local and through traffic. It is therefore held that through and local traffic are not of a like kind transported under the substantially similar circumstances and conditions contemplated by section 2 of the Act.

C. M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 44 L. Ed. 417.

T. & P. Ry. Co. vs. I. C. C. (Import Rate Case), 162 U. S. 197, 40 L. Ed. 940.

§ 4. Discriminations Between Foreign and Domestic Traffic.

The early holdings of the Commission and the courts that the competition between ocean carriers at seaboard ports did not create a sufficient dissimilarity of circumstances and conditions within the meaning of the Act to render lawful discriminations in rates applying to import and export traffic on inland hauls, and that such import and export traffic should move on the inland rates applying on domestic traffic, were not sustained by the Supreme Court, which held that the necessities of the country's commerce required recognition of the competition in foreign traffic, and that such disparities as were caused by such competition among the ocean carriers in the inland

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rates did not constitute unjust preferences within the meaning of the statute.

Import Rate Case, 162 U. S. 197, 40 L. Ed. 940.

See also:

Re Export Rates, etc., 8 I. C. C. Rep. 185.

Generally speaking, it is a question of fact whether export and import rates, as well as the rates on domestic traffic, are unjustly preferential or unreasonable. It is not any violation of the Act for the carrier to make a lower rate to the export port or from the port of entry on import goods and shipments for export than the rate on traffic locally consumed.

But carriers may not compete for and handle foreign business and at the same time refuse to handle domestic traffic. A carrier by transporting traffic destined for export to a port makes itself a common carrier as to that point, and thereby assumes an obligation to transport domestic traffic as well as export traffic.

Chamber of Commerce of Newport News vs. S. Ry. Co., 23 I. C. C. Rep. 345, 355.

See also:

National Dock & Storage Warehouse Co. vs. B. & A. R. R. Co., 33 I. C. C. Rep. 330, 331.

National Lumber Exporters' Assn. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 215.

Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403.

Board of Trade of Chicago vs. I. C. R. R. Co., 26 I. C. C. Rep. 545.

Galveston Commercial Assn. vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 216, 224, 226.

Greenbaum Co. vs. C. & O. Ry. Co., 25 I. C. C. Rep., 352.

In re Advances on Cotton, 23 I. C. C. Rep. 404, 411.

Mobile Chamber of Commerce vs. M. & O. R. R. Co., 23 I. C. C. Rep. 417, 423, 426.

Red River Oil Co. vs. T. & P. Ry. Co., 23 I. C. C. Rep. 438, 447.

- New Orleans Board of Trade vs. I. C. R. R. Co., 23 I. C. C. Rep. 465, 469.
Baltimore Chamber of Commerce vs. B. & O. R. R. Co., 22 I. C. C. Rep. 596, 603.
Bulte Milling Co. vs. C. & A. R. R. Co., 15 I. C. C. Rep. 351, 360.
Ullman vs. Adams Express Co., 14 I. C. C. Rep. 340, 345.
Hecker-Jones-Jewell Milling Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 356, 360, 363.
Thompson Lumber Co. vs. I. C. R. R. Co., 13 I. C. C. Rep. 657, 666.
N. Y. C. & H. R. R. R. Co. vs. I. C. C., 168 Fed. Rep. 131.

Compare earlier rulings:

- 8 I. C. C. R. 214.
9 I. C. C. R. 534.
8 I. C. C. R. 110.
8 I. C. C. R. 185.
8 I. C. C. R. 304.

It is established that the publication of import rates on certain traffic lower than those on domestic traffic does not of itself constitute unjust discrimination against the domestic shipper, and that the question of whether or not unjust discrimination exists is one of fact to be determined by considering whether the circumstances and conditions controlling the import rates are dissimilar from those surrounding the domestic rates. *Texas & Pacific Railway vs. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940; *Pittsburgh Plate Glass Co. vs. P., C., C. & St. L. Ry. Co.*, 13 I. C. C. 87; *Louisiana Sugar Planters Assn. vs. I. C. R. R. Co.*, 31 I. C. C. 311.

In *Louisiana Sugar Planters Asso. vs. I. C. R. R. Co.*, *supra*, a rate of 21 cents on molasses from New Orleans and other Louisiana points to St. Louis was attacked as unjustly discriminatory as compared with a special import rate of 15 cents on blackstrap molasses from the same points of origin to St. Louis and East St. Louis, Ill. A rate of 29 cents on molasses, including domestic blackstrap, from these same points of origin, to Clinton and Lyons, Iowa, was also put in issue, because of an import

rate of 25 cents. The Commission found in that case that any difference greater than 3 cents per 100 pounds between the import and domestic rate from New Orleans to St. Louis and East St. Louis was unjustly discriminatory against the domestic product, and that the same relation should be maintained to the other destinations involved. It appeared that imported blackstrap comes to this country almost entirely from Cuba and that the rates were controlled by the Gulf lines, which also controlled practically all the traffic, having little competition with the lines operating from north Atlantic ports for this business.

In the course of that opinion the Commission said:

"The complainants insist that as the service rendered in transporting the imported blackstrap is exactly the same as the service rendered in transporting the domestic blackstrap, there can be no lower rate on imported blackstrap than on domestic blackstrap. It is now too late, however, to discuss that question, as the Supreme Court in *Texas and Pacific Ry. Co. vs. Interstate Commerce Commission*, 162 U. S. 197, known as the Import Rate case, held that foreign traffic when carried from the port of entry to final destination and domestic traffic carried from the same port to the same destination are not traffic of 'like kinds,' and that the service in the one case is not performed under circumstances and conditions substantially similar to those under which the service rendered in the other case is performed, and that therefore the rates on the two kinds of traffic need not be the same. Following that case we have repeatedly recognized the right of carriers to maintain lower rates on imported traffic than on domestic traffic, and imported goods move in large volume on special rates which are lower than the rates charged on goods of the same kind which have not been imported. It does not follow, however, because an im-

port rate which is lower than the domestic rate may be maintained on blackstrap that the difference in the two rates may be whatever the carriers may choose to establish. In the Import Rate case, *supra*, the court held that the Commission in determining whether or not the difference made by the carrier between the import rate and the domestic rate was unjust should consider all the circumstances and conditions, including the interests of carriers, producers, dealers and consumers."

In *Pittsburgh Plate Glass Co. vs. P. C. C. & St. L. Ry. Co.*, *supra*, the Commission considered the question of whether or not it was unjustly discriminatory to assess the third class rating on domestic plate glass and the fourth-class rating or lower on the imported article; also whether the maintenance of certain specific import rates on this commodity through New Orleans materially lower than the domestic rates between points in this country was unjustly discriminatory. It appeared that the low import rates through Gulf ports were quoted to enable the lines operating from those ports to handle some of the import business that would naturally seek the north Atlantic ports because of the longer voyage to Gulf ports, slower steamers, and less frequency and regularity of service. The Commission did not find that the existing situation resulted in unjust discrimination, and in the course of its opinion said:

"It is clear that in considering the question of alleged unjust discrimination in favor of shippers of import glass moving from the ports of entry in this and adjacent foreign countries to interior American destinations, and against domestic shipments of glass between points in the United States, it is the duty of the Commission to look to the circumstances and conditions affecting the matters involved, not only in this country, but in the entire field of commerce

here and abroad. In other words, 'whatever would be regarded by common carriers, apart from the operations of the statute, as matters which warranted differences in charges' ought to be considered in forming a judgment, whether such differences were or were not unjust, and the circumstance of competition by ocean carriers at the different ports is a fact meriting consideration by the Commission in passing upon the reasonableness of an inland rate applicable from the seaboard on domestic traffic when the reasonableness of such rate is called in question by comparison with a lower rate applying from the port of entry on traffic shipped from a foreign country."

Import and Domestic Rates—Clay, 39 I. C. C. Rep. 132, 139.
Import and Domestic Rates, 36 I. C. C. Rep. 389, 396.

§ 5. Quantity of Traffic.

The Commission holds it to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of the service. It necessarily follows that when this difference in the cost of the service is eliminated, the reason for the discrimination fails.

California Coml. Assn. vs. Wells, Fargo & Co., 14 I. C. C. Rep. 422, 431.

See also:

B. C. R. & N. R. Co. vs. N. W. Fuel Co., 31 Fed. Rep. 652, 655.

Kinsley vs. B. N. Y. & P. R. R. Co., 37 Fed. Rep. 18.

Scofield vs. L. S. & M. S. R. Co., 2 I. C. C. Rep. 90.

Lundquist vs. G. T. R. Co., 121 Fed. Rep. 915, citing I. C. C. vs. B. & O. R. Co., 145 U. S. 263.

I. C. C. vs. Ala. Mid. R. Co., 168 U. S. 144, and T. & P. R. Co. vs. I. C. C., 162 U. S. 197.

Compare:

G. W. R. Co. vs. Sutton, 4 L. R. 266 (English), and Denaby Main Colliery Co. vs. Manchester Ry. Co., 11 Appeal Cases 97, holding that in determining just discrimination, the circumstances must relate to the carriage, and not to the person of the sender.

A classification of freight designating different classes for carload quantities and for less than carload quantities for transportation at a lower rate on the carloads than on the less than carload shipments is not in violation of the Act to Regulate Commerce. The circumstances and conditions of the transportation in respect to the work done by the carrier and the revenue earned are dissimilar, and may justify a reasonable difference in rate. The public interests are subserved by carload classifications of property that, on account of the volume transported to reach markets or supply the demands of trade throughout the country, legitimately or usually moves in such quantities.

Thurber vs. N. Y. C. & H. R. R. Co., 3 I. C. C. Rep. 473, and 2 I. C. C. Rep. 742.

It is a well recognized business principle that the greater the quantity the lower the price may be proportionately fixed. It was one of the earliest contentions, under the Act to Regulate Commerce, that quantity of shipment justifies a difference in rate, but the spirit of the law, if not the letter, stamped such a discrimination as to quantity, from the standpoint of public policy, as necessarily injurious to the smaller shippers who are not able to ship in the required quantities. Such a principle applied to transportation has all the earmarks of monopoly. The principle is reflected from an assumed analogy to the principle of wholesale and retail purchasers of merchandise. This principle in the adjustment of freight rates was urged from the first by heavy shippers, and the Commission in an early case condemned it as repugnant to the spirit and purpose of the statute. The case involved the right of a carrier to allow a discount of ten per cent on a shipment of thirty thousand tons of freight, which the facts dis-

closed but one shipper was able to make. The Commission said:

"A railroad company if allowed to do so might in this way hand over the whole trade along its road to a single dealer, for it might at law make a discount equal to or greater than the ordinary profit in trade, and competition by those who would not get the discount would then be out of the question."

Providence Coal Co. vs. P. & W. R. R. Co., 1 I. C. C. Rep. 107, 1 I. C. C. Rep. 363.

The same principle was involved with respect to passenger fares and after the Commission had condemned the practice of carriers making reduced fares for explorer's, settler's, immigrant's and party rate tickets, as in contravention of section 2, the Supreme Court, in the so-called Party Rate Case, 145 U. S. 263, 36 L. Ed. 703, declared that the carriers were only bound by the section to afford the same terms to all persons similarly circumstanced, and that any fact that produced change in condition and different circumstances and conditions justifies an inequality of charge. The court considered section 2 in its relation to section 22, which is illustrative of section 2, in that it specifically enumerates those in whose favor discrimination might be made without being deemed unjust, and held that the granting of party rates was not prohibited by the provisions of section 2.

This would seem to create a paradoxical state of affairs, since the provisions of section 2 in the Act read alike as to passengers and property, and the apparently conclusive reasons advanced by the Commission for the exclusion of the principle from freight shipments. But the Supreme Court drew a distinction, not in the principle, but in its application, between passenger and freight traffic. The court said that a discrimination in passenger fares on the

basis of the number carried, under party rate tickets, was justifiable, because the object of such reduced fare tickets was to induce travel and consequent patronage which otherwise would not be enjoyed by the carrier. On the other hand, while no one is injured or can be injured by reduced rate passenger fares, reduced rates on freight based upon the quantity of shipment might easily put out of business all but the favored shipper whose business was sufficiently large for him to meet the requisite tonnage.

This principle as obtaining to freight shipments has been tenaciously advocated by large shippers, and the language of the Supreme Court is instructive, as well as conclusive.

If for example the railroad makes the public generally a certain rate of freight and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may enable him to obtain a complete monopoly of that business. Then if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may if carried too far operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market. The same result, however, does not follow from the sale of tickets for a number of persons at a less rate than for a single passenger, who cannot be said to be injured by the fact that another is enabled at a particular instance to travel at a less rate than he. If it operates unjustly toward any one, it is the rival road which has not adopted corresponding rates; but as before observed, it was not the design of the act to stifle compe-

tition, nor is there any legal injustice in one person's procuring a particular service cheaper than another.

The practice of allowing cargo or trainload differentials has been condemned by the Commission as unlawfully discriminatory. In one of its early cases, where a carrier had allowed a lower rate on cargo lots of ten thousand bushels of oats and eight thousand bushels of other grains than on carload lots of the same commodities in export shipments, or when transported to the seaboard for export, the Commission did not decide, but strongly intimated that such lower rate was an unjust discrimination in violation of section 2. The Commission declared that any practice which tended to discriminate between shippers according to the quantity of shipment, and which was not justified by the difference in cost of the service was unreasonable and unlawful. This principle was applied by the Commission in *Glade Coal Co. vs. B. & O. R. Co.*, 10 I. C. C. Rep. 226, where a difference in rate was made according to the manner in which coal in carloads was loaded and where there was no justifiable difference in the cost of service to the carrier.

Payne Bros. vs. L. V. R. Co. et al., 7 I. C. C. Rep. 718.

Lower rates for trainload quantities than for carloads condemned, see—

Planters' Comp. Co. vs. C. C. C. & St. L. R. Co., 11 I. C. C. Rep. 382.

Glade Coal Co. vs. B. & O. R. Co., 10 I. C. C. Rep. 226.

Carr vs. N. P. R. Co., 9 I. C. C. Rep. 1.

Harvard Co. vs. Penna. Co. et al., 4 I. C. C. Rep. 212, 3 I. C. C. Rep. 257.

Kinsley vs. B. N. Y. & P. R. Co., 37 Fed. Rep. 181.

U. S. vs. Tozer, 39 Fed. Rep. 309.

That a reasonable, fair and just difference may be made in proportion to quantity hauled of the same article in a full carload and in less than carload lots, and the respective rates charged upon such according to weight, is a principle that has often been recognized by the Com-

mission. Hence, a difference in carload and less than carload rates is proper, but should not be unreasonable. There is always, however, the tendency on the part of the carrier to favor large shippers at the expense of small ones, and this has been the necessity for the Commission to approve the relation between carload and less than carload rates in some cases and condemn it in others.

Scofield vs. L. S. & M. S. R. Co., 2 I. C. C. Rep. 90, 2 I. C. C. Rep. 67.

Harvard Co. vs. Penn. Co., 4 I. C. C. Rep. 212, 3 I. C. C. Rep. 257.

Duncan vs. Atchison, etc., R. Co., 6 I. C. C. Rep. 85, 109.

Business Men's League vs. Atchison, etc., R. Co., 9 I. C. C. Rep. 318, 356, 357.

Barrow vs. Y. & M. V. R. R. Co., 10 I. C. C. Rep. 333.

Masurite Co. vs. Pitts., etc., R. Co., 13 I. C. C. Rep. 405.

In the Chicago Great Western case, the federal court held that the wholesale principle was applicable to freight rates and might justify lower rates to carload shippers.

I. C. C. vs. C. G. W. R. Co., 141 Fed. Rep. 1003, following 57 Fed. Rep. 1005 (4 I. C. R. 722).

Compare:

Paine Bros. vs. L. V. R. Co., 7 I. C. C. Rep. 218, where the Commission held that the wholesale principle of charging a less rate on larger shipments than on small ones was contrary to the rule of equality and to the purpose of the Act, and even if applied solely to exports, tended to furnish a temptation to shippers to manipulate large domestic seaboard shipments so as to get the low rates.

Also—

N. O. L. S. Exchg. vs. T. & P. R. Co., 10 I. C. C. Rep. 327.

The mere quantity of tonnage, unmeasured by any recognized unit of quantity adapted to carriage, and lessening the expense of transportation, is not a proper basis for difference in the rates for the transportation of the property.

Calif. Coml. Assn. vs. Wells, Fargo & Co., 14 I. C. C. Rep. 422.

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Nor can a discount based on the size of annual shipments be tolerated upon the wholesale principle.

Harvard Co. vs. Penn. Co., 4 I. C. C. Rep. 212, 3 I. C. C. Rep. 257.

See also

R. R. Comrs. of Texas vs. Weld, 96 Tex. 394, 73 S. W. 529.

Where no carload rate exists, the Commission hesitates to order one, because of the benefit to the larger shipper and the disadvantage to the smaller. It views in the same manner light mixed carload rates, because of the few shippers who can take advantage thereof. It has, however, ordered mixed carload rates to be established by carriers to prevent discrimination between similar commodities.

Kindel vs. B. & A. R. Co., 11 I. C. C. Rep. 495.

Milwaukee-Waukesha Co. vs. Chicago, etc., R. Co., 13 I. C. C. Rep. 28.

Paper Mills Co. vs. P. R. R. Co., 12 I. C. C. Rep. 438.

Roth vs. T. & P. R. Co., 9 I. C. C. Rep. 602.

Tecumseh Celery Co. vs. Cin., etc., R. Co., 5 I. C. C. Rep. 663, 4 I. C. C. Rep. 318.

It is conclusive, therefore, that any discrimination in rates between carload shipments and less than carload quantities must have reference to the circumstances relating to the carriage and not to the person of the shipper, and that the degree of discrimination must be reasonably in proportion to the difference in the cost of the service to the carrier.

In commercial affairs the wholesale principle is applied in the fixing of prices for large quantities. This principle to a limited extent, is recognized in railroad rate-making in the establishment of carload ratings and rates. It is employed in connection with ratings for large multiples of weight units when such aggregate of weight units can be handled by the carrier in a single service unit. In other words, the car of the carrier when fully loaded may

be charged for on a relatively lower scale of rates than is applicable to a smaller quantity of like freight, but the wholesale principle is not applied to multiples of carloads or train units. Ten carloads do not warrant any lower charge per car than the single carload.

The Commission has always recognized the propriety of carload ratings. It has in many cases established carload and less-than-carload rates upon the same commodity. Whether a carload rating should be established, in a given instance, depends not only upon whether a commodity is offered for shipment in carload quantities, but also upon other considerations. The shipper tendering a carload of freight is not of necessity entitled to a more favorable rate than one who tenders 100 pounds of the same commodity. To hold that the carload must be given a lower rate per 100 pounds than the smaller quantity, for the sole reason that the cost of the service to the carrier is less in the case of a carload shipment, then, by the same reasoning, a train load should in turn receive a lower rate per 100 pounds than the carload. Such reasoning, however, is not countenanced by the Commission.

The result of this wholesale principle carried to any extreme beyond the single carload unit would be to build up overwhelming monopolies among the large shippers to the exclusion of equal opportunity for smaller single carload shippers to compete with them.

An early controlling case, so far as the attitude of the Interstate Commerce Commission toward the establishment of carload ratings is concerned, was *Brownell vs. C. & C. M. R. R. Co.*, 5 I. C. C. Rep. 638. The ground of the Commission's ruling in the *Brownell* case is found on page 651, as follows:

"The unit of quantity that carriers have universally employed for the purpose of rate making is the 100

pounds. The purpose of a classification is to group the various articles of commerce into general classes upon which the rate per 100 pounds shall apply. Classification of carloads in a lower class than is given to the same articles in a less quantity was at first merely incidental to the business of transportation, and the practice has not yet become so general that a lower carload class must be given to every article which may be offered in carload quantities. The justice of the demand depends upon the facts in each case; it cannot be determined by an inflexible general rule. It is a sound rule for carriers to adapt their classifications to the laws of trade; that is, as before stated, if an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give it a carload classification. The large dealers, who now control more than three-fourths of the business of gathering and shipping eggs to the large cities, cannot be said to suffer material damage from the competition of small shipments under the same rate to the same market. Beyond giving a practical monopoly to the large dealers, it does not appear that any other portion of the public would be benefited by a lower class for carloads of eggs. If the railroads were not willing to gather the small lots of eggs and carry them direct to a general market, there might be some grounds for holding that the volume of egg traffic, the demands of trade, and the interests of local dealers and producers are such that a lower carload classification is desirable; but the special facilities furnished local shippers for putting their eggs in large markets in as fresh state as possible are, in our view, of greater benefit to producers, local dealers, city dealers and consumers than any other method of gathering and shipping which has yet been devised for this or any other perishable food product; and such advantage to the general public should not be interfered with or its continuance in any way discouraged unless a more satisfactory method of reaching the markets can be established in its stead."

See also:

- John Taylor D. G. Co. vs. M. P. R. R. Co., 28 I. C. C. Rep. 205, et seq.
In re Suspension and Investigation of Western Classification No. 51, 25 I. C. C. Rep. 442, et seq.
In re Advances on Milk, 23 I. C. C. Rep. 500, 503.
Albree vs. B. & M. R. R. Co., 22 I. C. C. Rep. 303, 319.
Florida Fruit & Veg. Assn. vs. A. C. L. R. R. Co., 17 I. C. C. Rep. 552, 564.
Voorhees vs. A. C. L. R. R. Co., 16 I. C. C. Rep. 42, 43.
Carstens Packing Co. vs. O. S. L. R. R. Co., 17 I. C. C. Rep. 324, 328.
Bentley & Olmsted vs. L. S. & M. S. Ry. Co., 17 I. C. C. Rep. 56.
Duncan & Co. vs. N. C. & St. L. Ry. Co., 16 I. C. C. Rep. 590.
Wholesale Fruit & Produce Assn. vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 410, 418.
California Commercial Assn. vs. Wells, Fargo Ex. Co., 14 I. C. C. Rep. 422, 431.
National Wholesale Lumber Dealers' Assn. vs. A. C. L. R. R. Co., 14 I. C. C. Rep. 154, 162.
Planters' Compress Co. vs. C. C. C. & St. L. R. R. Co., 11 I. C. C. Rep. 382.
Brownell vs. C. & C. M. R. R. Co., 5 I. C. C. Rep. 638.

A very recent expression on the subject by the Interstate Commerce Commission is that:

"A carload minimum weight, which is reasonably adapted to the needs of the carrier and a great majority of shippers, will not be increased because one shipper by the expenditure of exceptional effort finds himself able to load more heavily than his competitor, neither will this Commission under such circumstances prescribe a lower rate per 100 pounds conditional upon the use of the higher minimum weight as the measure of the carload."

This is very expressive of the denial by the Commission of any extreme use of the wholesale principle in respect to increased tonnage units above carload quantities.

§ 6. Consolidated Carloads of Less-Than-Carload Shipments.

The less-than-carload rate usually exceeds the carload rate upon the same commodity. If, therefore several less-

than-carload shipments can be bunched together and sent at the carload rate a material saving results to the shippers, and this is especially true where the movement is over long distances and the rate considerable.

For the purpose of making this saving shippers have been and are accustomed to combine by agreement among themselves their less-than-carload freight into carloads, consigning the carload to some individual at the destination point, who makes the proper distribution. There has also come into existence a class of operators known as "forwarders," or forwarding agents, whose business it is to solicit less-than-carload shipments to be combined and forwarded as carloads. The forwarder loads the car and ships as a carload either in his own name or to some consignee who acts as his agent at the point of distribution in making distribution to the various owners. The freight is paid to the railroad by the forwarder or his agent, who charges the shippers something less than the regular rate upon their less-than-carload shipments. The result of the transaction is that the railroad receives its published carload rate, the shippers pay less than the published less-than-carload rate, while the forwarder, for the service of assembling the freight, loading the car, making the shipment and distributing the freight at destination, retains the difference between what it collects from the shippers and what it pays the railroad.

The carriers for the purpose of preventing the transaction of this business, adopted a rule by which it was provided, in substance, that the carload rate should not be applied unless all the merchandise in the car was owned by one individual. Since, in point of fact, the combined carload is owned by several different individuals, and since this must, in the nature of things, be indicated by the

marks upon the packages, the enforcement of this rule prevented the operations of the forwarder.

One of these forwarding agents applied by complaint to the Commission, alleging that the above rule was unlawful under the act to regulate commerce, inasmuch as the railroad had no business to inquire whether the entire carload was or was not owned by one person, and the Commission so held. It was of the opinion that if the carload was loaded by the shipper, tendered for shipment as a carload by the consignor, billed to a single consignee, to be received and unloaded by that consignee, in exactly the same way as though the same articles were the property of a single individual, the railroad could not look beyond the physical incidents of the transportation and refuse for that reason to apply its published tariff rate. That rate having been named was open to every member of the public who brought himself within its provisions.

The Circuit Court for the Southern District of New York enjoined the order of the Commission, but the Supreme Court of the United States, upon appeal, reversed the holding of the circuit court and sustained the Commission's order.

The court has apparently laid down in this case two propositions:

First. That where the order of the Commission depends upon a finding of fact the finding of the Commission is conclusive upon the court.

Second. That a carrier can not make the ownership of goods the measure of the rate which shall be applied.

The language of the court is as follows:

"As shown by the opinion of the Commission and that of the two members who dissented there were many and wide differences in the views expressed.

On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition—that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. (*Baltimore & Ohio R. R. vs. Pitcairn*, 215 U. S. 481.) This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court, because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn Act and because the decision below was made in June, 1909, before the announcement of the opinion in the *Pitcairn* case." (*Ib.*, 251-2.)

It may be interesting to note that this same question was fought out through a long series of suits between the forwarders and the railways in England, with the same result as that reached by our Supreme Court.

§ 7. Discriminations Between Commodities Account Mode of Shipment.

The Commission held, in a case where a carrier had published a special rate on immigrant movables between interstate points of \$60 per car, whereas the regular tariff rate on household goods would have brought the charges up to \$122 per car between the same points, on the ground that this lesser rate was offered as an inducement to immigrants to develop a sparsely settled section of the country, that there was no dissimilarity of circumstances and conditions in the service performed as would justify the difference in rates, and that such differences constituted unjust discrimination.

Elvey vs. I. C. R. R. Co., 3 I. C. C. Rep. 652, 2 I. C. C. Rep. 804.

In *Connor vs. Mobile & Ohio Railroad Co.*, 11 I. C. C. R. 537, the Commission declared that a just relation of rates between flour in sacks and flour in barrels would be for the charge per barrel to be double the rate per 100 pounds in sacks, inasmuch as a barrel contains about 200 pounds of flour and is generally accepted and treated as of that weight by carriers and shippers for transportation purposes.

For a special service by a carrier, such as the transportation of freight requiring quick movement, prompt delivery at destination, special fitting of cars, their withdrawal from other service and their return empty on fast time, all involving greater expense to the carrier, a higher rate than for the carriage of ordinary freight is warranted by the conditions of the service and is reasonable and just. But the higher rate for a special service should bear a just relation to the service of the traffic, and is not wholly in the discretion of the carrier. While a carrier should be fully compensated, the public inter-

ests require that the traffic should not be rendered valueless to the producer, if the charges of the carrier have such an effect and can be reasonably reduced.

The requirements of the statute that all rates shall be reasonable and just involves a consideration of the commercial value of the traffic, and implies that rates should be so adjusted that producers of traffic as well as carriers may carry on their pursuits successfully, if practicable for both and without injustice to the carrier. The public good requires what is plainly the spirit of the law, that the transportation interests are not alone to be considered, but that in the just exercise of regulation, care should be taken that the lawful and necessary occupations of citizens are not unjustly burdened.

Delaware, St. Grange, etc., vs. N. Y. P. & N. R. Co. et al., 4 I. C. C. Rep. 588, 3 I. C. C. Rep. 554.

In a case where a carrier discontinued track delivery of carload shipments of hay at a certain terminal, but continued to make such delivery of other carload traffic, such action respecting hay shipments being taken to relieve a state of chronic congestion at the terminal, and such carrier continued to make delivery of hay in carloads at certain other points immediately adjacent to such terminal and within certain established lighterage district embracing such terminal, the Commission held that the resulting discrimination against hay in carloads was not unjust within the meaning of the Act to Regulate Commerce.

It is an undue preference where a carrier refuses to establish carload rates, or mixed carload rates, on certain commodities while allowing such rates to other articles of the same traffic class.

Brownell vs. Columbus, etc., R. Co., 5 I. C. C. Rep. 638, 4 I. C. C. Rep. 285.

Roth vs. T. & P. R. Co., 9 I. C. C. Rep. 602.

Tecumseh Celery Co. vs. Cinn., etc., R. Co., 5 I. C. C. Rep. 663.

It is also an act of undue discrimination for a carrier to refuse to furnish cars suitable for the transportation of certain commodities while furnishing similar cars for the shipment of other commodities.

Paxton Tie Co. vs. D. S. R. Co., 10 I. C. C. Rep. 422.

An arbitrary classification of goods, which discriminates as to the use of packages or cases of a certain kind or size, is unlawful, but if the shipper is left free to choose and get whatever rates he chooses by adopting either method of packing for shipment, the discrimination is not unjust within the meaning of the statute.

Phila. Trades League vs. P. & R. R. Co., 8 I. C. C. Rep. 368.

It is apparent that so long as the thousands of articles offered for transportation are divided into a comparatively small number of classes for rate-making purposes, the minute variations in value of different articles, or dissimilar values of the same article, can not be precisely reflected in the classification. In the absence of evidence that the rate resulting from the classification is unreasonable or otherwise unlawful, it must obviously appear that a particular article is not rated with other articles similar in value, weight, and other essential transportation qualities, before the Commission will require a change of classification.

Upon this reasoning, and the facts before them, the Commission approved as reasonable the fifth class rating of wooden tank material, in Official Classification territory.

Caldwell Co. vs. C. I. & L. Ry. Co. et al., 20 I. C. C. Rep. 412, 415.

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If tariffs contain rates applicable only to the shipments of certain consignees or when a commodity is put to a particular use and the rates which are so restricted to the use of certain shippers and not open to all shippers alike, they are in violation of section 2 of the Act, and unjustly discriminatory in violation of section 3 of the Act, and therefore unlawful.

In the Matter of Restricted Rates, 20 I. C. C. Rep. 426, 437.

So, a tariff which provided more advantageous rates and mixed carload privileges for building and roofing paper than for felt, other than wool, was held to be unreasonable and unlawful.

Barrett Mfg. Co. vs. C. M. & St. P. R. Co., 20 I. C. C. Rep. 79, 80.

Where a higher charge for transportation is exacted for the sole reason that the coal is loaded other than by tipple, with lower transportation charge existing and assessed on carloads of coal loaded by tipple, such higher charge is unreasonable and unduly discriminatory, because it is not justified by the difference in cost to the carrier between the different methods of loading.

Glade Coal Co. vs. B. & O. R. Co., 10 I. C. C. Rep. 226.

§ 8. Miscellaneous Discriminations.

(1) **Weight of Oil Barrels.**—In *Penna. Refining Co., Ltd. vs. W. N. Y. & P. R. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, the Supreme Court of the United States declared that carriers can not be charged with discrimination against shippers of oil in barrels between interstate points, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them,

the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than the transportation by barrels, and the barrel shippers have made no demand for tank cars, and can not use them economically for such shipments on account of the lack of facilities for unloading.

(2) **Commissary Car.**—Where a carrier had operated for twenty-five years a commissary car making semi-monthly trips with staple lines of meats and groceries, and restricted stocks of shoes, overalls, and other wearing apparel, and selling only the employes of the company and their immediate families, and not for cash, but upon wage tickets signed by company foreman showing amount of wages due to the holder, and purchases limited to two-thirds of amount of wages shown due, the Commission held that the operation of such a car is in violation of the commodities clause of the act and also in violation of sections 2 and 3 in that such a practice unjustly discriminates against other persons who pay full tariff rates for the same service.

Confr. Rulings Bull. No. 6, Ruling No. 257.

See also:

Re Restricted Rates, 20 I. C. C. Rep. 426, 427.

(3) **Refusal of Express Company to Extend C. O. D. Service to Shipments of Liquor.**—In a case where an express company refused to perform a "C. O. D." service for all liquor shippers alike, there could be no discrimination as between the liquor shippers at a particular point. But the question was presented, that the extending of the C. O. D. service to ordinary merchandise was an undue discrimination against liquor shipments for which the express company declined to act as a collecting agent. Without

passing upon the question of whether the service of collecting agent was a part of the legal duty of the express carrier, the Commission held that inasmuch as the express company did not decline to transport liquor shipments, but merely refused to act as collecting agent on such shipment, the discrimination was not unjust within the meaning of the third section of the act.

Royal Brewing Co. vs. Adams Ex. Co., 15 I. C. C. Rep. 255, 258.

(4) **Use of Commodity.**—Where differences are made in rates on like commodities according to their use or the "business motive" of the shipper, such differences amount to unlawful discriminations as prohibited by section 2. Rates restricted to the particular use of a certain commodity or in favor of a certain shipper are unlawful.

In the Matter of Restricted Rates, 20 I. C. C. Rep. 426.

Re Contracts of Express Cos. for Free Transportation, 16 I. C. C. Rep. 426.

Fort Smith Frt. Bu. vs. St. Louis, etc., R. Co., 13 I. C. C. Rep. 651.

Duncan vs. A. T. & S. F. Ry. Co., 6 I. C. C. Rep. 85.

I. C. C. Confr. Rulings Bulletin No. 6, Rulings 373, 225, 34, 9, 2.

See also:

Classification of Chain, 39 I. C. C. Rep. 185, 186.

Casey-Hedges Co. vs. C. N. O. & T. P. Ry. Co., 39 I. C. C. Rep. 569, 572.

Official Classification Rates on Paper, 38 I. C. C. Rep. 121.

Rickards vs. S. A. L. Ry., 38 I. C. C. Rep. 218, 219.

Catoosa Limestone Products Co. vs. W. & A. R. R. Co., 38 I. C. C. Rep. 614, 615.

National Petroleum Assn. vs. A. T. & S. F. Ry. Co., 37 I. C. C. Rep. 287, 293.

Rates on R. R. Fuel and Other Coal, 36 I. C. C. Rep. 14.

The Iron & Steel Cases, 36 I. C. C. Rep. 86, 107.

Coal and Coke Rates to the Southeast, 35 I. C. C. Rep. 187, 190.

§ 9. Classification of Telegraph, Telephone and Cable Messages Permissible.

The Act to Regulate Commerce, Section 1 as amended, permits the classification of telegraph, telephone, or cable messages, subject to the provisions of the act, into day, night, repeated, unrepeated, letter commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.

Act to Reg. Com. (Amd. 1910), section 1, paragraph 3.

As between subscribers to a telephone service who are similarly situated, nothing but a difference in the service rendered or facilities furnished can justify a difference in the charges exacted.

The fact that a few subscribers connected with a new exchange were previously connected with another exchange which was abandoned by the defendant from motives of economy in management and efficiency of service is not such a dissimilarity of circumstances and conditions as to warrant the exaction of the current charges from a new subscriber while for the same service and facilities the old subscribers continue to pay the lower charges formerly exacted at the old exchange.

The contracts between such old subscribers and the defendant, even though valid when made, can not, after Congress has undertaken to regulate the rates and practices of telephone companies, be accepted as now justifying different charges as between different subscribers similarly situated, such undue discrimination being forbidden by the act.

Shoemaker vs. O. & P. Tel. Co., 20 I. C. C. Rep. 614.

The right of carriers subject to the act to initiate their

charges is too well established to need citation. Such charges are *prima facie* reasonable, except where otherwise provided by law. The Act to Regulate Commerce provides that messages may be classified into day, press, and such other classes as are just and reasonable, and that different rates may be charged for the different classes. Such messages may be in any language that can be expressed in Roman letters, or in code or cipher. For deferred or "half-rate" messages, subject to a delay not exceeding 24 hours in subordination to full paid traffic, 9 cents a word is charged. Code or cipher is not permitted. They must be written in plain language of the country of origin or destination, or in French as the universal language. These deferred messages are received by the carrier at any time. Still lower public rates apply to "cable letters" and "week-end letters," because of restrictions and conditions attaching to such messages.

In *White vs. Western Union Telegraph Co.*, 33 I. C. C. Rep. 500, 501, the telegraph company's standard rates for the transmission by telegraph of messages from New York, N. Y., to San Francisco, Cal., and by cable of messages from New York to points in England were attacked as both unreasonable and unjustly discriminatory. The Commission held that the evidence indicated that standard and press messages differ in circumstances attendant upon their transmission and that it was not warranted in the finding that the standard rate should be reduced to the press rate, or furnish a basis for determining what the rate relationship should be. It was not shown what should be the relationship between the rates for the different classes of cable service, but all cable rates mentioned above other than those for press service are open to the public.

CHAPTER IV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

Amplification of Section 5.

- § 1. Statutory Provisions.
- § 2. Freight Pools Prohibited.
- § 3. Effect of Carriers' Control of Routing Prior to Amendment of 1910.
- § 4. Relation of Section 5 of the Act to Regulate Commerce to the Sherman Anti-Trust Act.
- § 5. Amendment Affecting Railroad Ownership of Competing Water Carriers.

CHAPTER IV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

Amplification of Section 5.

§ 1. Statutory Provisions.

(As amended August 24, 1912.) "That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freight as aforesaid, each day of its continuance shall be deemed a separate offense.

Pooling of
freights and di-
vision of earn-
ings forbidden.

"From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Amendment of
August 24,
1912.

Railroads not to
own compet-
ing water car-
riers.

Penalty.

Commission to
determine as
to competition.

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

Orders to be
final.

Commission's au-
thority to al-
low ownership
of certain ves-
sel lines by
railroads.

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: **Provided**, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not

Rates of such
water carriers
to be filed
with Commis-
sion.

heard and disposed of before said date, may be considered and granted thereafter.

"No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States."

Violators
Sherman
not
canal.
of
Act
use

§ 2. Freight Pools Prohibited.

But one amendment to the fifth section of the Act to Regulate Commerce has been made since its original enactment. The section prohibits the pooling of freights for the purpose of redistributing property offered for transportation to different connecting carriers in agreed proportions or on stipulated percentages, as well as the division among such different and competing railroads of the aggregate

or net proceeds of the earnings of such railroads or any portion thereof.

The section contemplates two methods of pooling, both of which are prohibited; first, a physical pool controlling the distribution by the carriers of freights offered for transportation, and, second, a money pool consisting of a division between the different and competing railroads of their earnings or any portion of them.

In the *Immigrant Case* (10 I. C. C. Rep. 13) the Commission had before it a state of facts wherein, by mutual agreements, immigrant traffic through Atlantic ports was apportioned between the carriers in proportion to the amount of domestic passenger business done by each, and, in the case of a deficiency of domestic traffic on any particular line, it was made up by according to that line a greater percentage of immigrant traffic. The practice was confined solely to immigrant traffic and the rates applied from the seaboard were the regular domestic rates. The carriers contended that such practice was necessary to facilitate the movement of the immigrants through Atlantic ports and to promote their safety and comfort as passengers. The Commission held that whether the practice was in violation of section 5 of the Act was at least doubtful and inasmuch as no discrimination resulted therefrom no desisting order was issued.

Re Transportation of Immigrants from New York and other ports to Western destinations, 10 I. C. C. Rep. 13.

While this particular section of the Act was the subject of much discussion prior to the enactment of the statute, it has since been brought before the courts for judicial review in but few instances.

In an earlier case the courts held that any arrangement,

oral or otherwise, or combination, which had for its purpose the pooling of freights, came within the inhibition of the section.

In re Pooling Freights, 115 Fed. Rep. 588.

In the **Southern Pacific case** the court held that both pooling and rebates were within the prohibitions of the Act and that one could not be set up as a prevention of the other.

I. C. C. vs. S. P. Co., 123 Fed. Rep. 597, 602.

In still another case, it was held that the words "contract, agreement, or arrangement" for the pooling of freights contemplates agreements for the pooling of traffic.

I. C. C. vs. S. P. Co., 132 Fed. Rep. 829, 836. (See also 137 Fed. Rep. 606, 200 U. S. 536, 50 L. Ed. 585.)

In the **Southern Pacific case** (200 U. S. 536, 50 L. Ed. 585) the Supreme Court held that section 5 of the Act did not make it unlawful for an initial carrier to enter into an agreement for joint through rates with any or all of its connections even though such connecting carriers might be competitors as between themselves. Such an agreement might also contain provision for routing by the initial carrier under the joint through rate and still not be in violation of the pooling statute, it having been previously held by the court that a common carrier may not be compelled at law to contract to carry beyond its own line but may end its responsibility at the end of its line and charge for such transportation its legally published local rate. If such carrier is willing to agree to transport beyond its own line it is at liberty to do so in connection with such lines as it chooses and this without such right being dependent upon the initial carrier's agree-

ment to be liable for the default of its connection after the shipments are delivered thereto. In making such an agreement for through transportation the carrier may do so upon such terms as may be agreed upon so long as they do not violate the law and so far as the provisions of section 5 of the Act are concerned the Supreme Court held that connecting roads after entering into a through rate agreement are no longer competing roads.

In the course of its opinion, the court said:

"That Act recognizes the right of the carriers to agree upon and provides for the publication of joint through tariff rates between continuous roads, on such terms as the roads may choose to make, provided, of course, the rates are reasonable and no discrimination, or other violation of the Act is practised. The initial carrier did not, on its line, reach the eastern markets but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement of joint through rates, with all or any of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provisions of the Act. * * *

"All that would be needed for the total suppression of rate competition among the connecting railroads would be the honest fulfillment of their agreement as to joint through rates. And just here is where they failed and where they violated their agreement and the law by granting rebates, or, in other words, by competing, as to rates, for the freight in violation of the joint rates. In such case we do not see any violation of the pooling section of the Act, by putting in the agreement for joint through rates the provision for routing by the initial carrier. It achieved its purpose and stopped rebating, although it thereby also stopped rate competition which, in the presence of the

through rate tariff, was already illegal. The railroads are no longer rate competing roads after the adoption of a through rate tariff by them, and they have no right to privately reduce their rates.

"Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the fifth section of the Act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

"We must remember the general purpose of the act which is, as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight and the honest performance of duty, with no improper or unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the Act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

S. P. Co. vs. I. C. C., 200 U. S. 536, 50 L. Ed. 585.

This decision of the Supreme Court was in review of the decree of the Federal court in **Interstate Commerce Commission vs. S. P. Co.**, 132 Fed. Rep. 829, enforcing the order of the Commission in **Consolidated Forwarding Co. vs. S. P. Co.**, 9 I. C. C. Rep. 182. The litigation grew out of pooling and routing arrangements effected by the carriers in connection with the transportation of citrus fruits from California points to eastern destinations. The Commission had held that the action of the carriers constituted a traffic pool prohibited by section 5 of the Act but the ruling of the Supreme Court of the United States,

as above noted, was to the effect that the initial carriers had the right to agree with any or all of their connections for the establishment of through rates and that while the rule and the agreement with the eastern lines deprived the shippers of competition between such lines for their patronage, neither the rule nor the agreement was in violation of the section.

In the **Cincinnati** case the Commission held that rates consummated through the action of the Southern Railway & Steamship Association from New York and Chicago to points in southern territory, so adjusted as to prevent competition between the lines leading from the eastern seaboard and central territory to the south thereby securing to the eastern lines and eastern territory traffic in favored articles and merchandise and to central territory and lines leading therefrom the traffic in coarser commodities, each carrier under the association agreement making deposits of money with the association out of which any carrier that had sustained loss of revenue by reason of another carrier taking traffic that belonged to it should be indemnified, were the result of an arrangement that was tantamount to an agreement for the pooling of earnings and therefore unlawful.

Freight Bureau of Cincinnati vs. C. N. O. & T. P. Ry., 6 I. C. C. Rep. 195, 253, 4 I. C. R. 592.

In the **Tift** case, in which the decree of the federal court enforcing the order of the Commission was affirmed by the Supreme Court of the United States, the Commission had held that the action of competing lines from points in the southern states to the Ohio River in advancing rates on lumber by concert of action was violative of section 5 of the Act and that pooling may be as well effected by concert in fixing in advance the rates which, in

the aggregate, will accumulate the earnings of naturally competing lines, as if an actual deposit of all such earnings had been consummated.

Southern Ry. Co. vs. Tift, 206 U. S. 428.

Tift vs. Sou. Ry. Co. vs. 138 Fed. Rep. 753, 761.

Tift vs. Sou. Ry. Co., 10 I. C. C. Rep. 548.

§ 3. Effect of Carriers' Control of Routing Prior to Amendment of 1910.

The Supreme Court of the United States, prior to the 1910 Amendment of the Act to Regulate Commerce, had held that carriers might, without violating section 5, enter into agreements to control through routings as a condition precedent to a guaranty of through rates to shippers.

S. P. Co. vs. I. C. C., 200 U. S. 536, 50 L. Ed. 585.

See also:

U. S. vs. Trans-Missouri Frt. Assn., 166 U. S. 290, 41 L. Ed. 1007.

Independent Refiners Assn. vs. W. N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 4 I. C. R. 162.

§ 4. Relation of Section 5 of the Act to Regulate Commerce to the Sherman Anti-Trust Act.

The Sherman Anti-Trust Act of July 2, 1890, prohibited all forms of combination by trusts or otherwise in restraint of trade. An agreement had been entered into by railroad companies operating in a certain territory for the formation of a joint traffic association, the purpose of which was to establish and maintain reasonable and just rates, fares, and charges, to provide equal or proportional rates for each company member therein and to effect a just and proportional division of the competitive traffic of such carrier members. A suit was brought against such joint traffic association, which was known as the

Trans-Missouri Freight Association, under the provisions of the Sherman Anti-Trust Act. The complaint was defended by the carriers on the ground that the agreement by the railroads was permitted by section 5 of the Act to Regulate Commerce. The case was carried to the Supreme Court which held that the Act to Regulate Commerce did not authorize such an agreement. That while it did not in terms prohibit it, it neither conferred directly nor by implication any authority to make such an agreement. It was the view of the court in fact that the general nature of a contract like the one then before it was neither mentioned in nor provided for by the Act to Regulate Commerce.

In the course of its opinion, the Court, in referring to the relation of the Act to Regulate Commerce and the Sherman Anti-Trust Act, said:

"The first answer to this argument is that, in our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication, any authority to make it. If the agreement be legal it does not owe its validity to any provision of the Commerce Act, and if illegal it is not made so by that Act. The fifth section prohibits what is termed 'pooling,' but there is no express provision in the Act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the Act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the Act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for

by the Act. The provisions of that Act look to the prevention of discrimination to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and in the language of counsel for defendants 'without reference to the location of those points or the lines over which it is necessary for the traffic to pass,' to procure uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The Act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates. Competing and nonconnecting roads are not authorized by this statute to make an agreement like this one.

"As the Commerce Act does not authorize this agreement, argument against a repeal by implication, of the provisions of the Act which it is alleged grant such authority, becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other.

"It is plain, also, that an amendment of the Commerce Act would not be an appropriate method of enacting the legislation contained in the Trust Act, for the reason that the latter Act includes other subjects in addition to the contracts of or combinations among railroads, and is addressed to the prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the Commerce Act furnishes no reason for claiming that the later statute does not apply to railroad transportation. Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any

subsequent Act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.

"The existence of agreements similar to this one may have been known to Congress at the time it passed the Commerce Act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the Commerce Act. Yet, if it had been known to Congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the Trust Act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such Act. Congress for its own reasons, even if aware of the existence of such agreements, did not see fit when it passed the Commerce Act to prohibit them with regard to railroad companies alone, and the Act was not an appropriate place for general legislation on the subject. And at that time, and for several years thereafter, Congress did not think proper to legislate upon the subject at all. Finally it passed this Trust Act; and in our opinion no obstacle to its application to contracts relating to transportation by railroads is to be found in the fact that the Commerce Act had been passed several years before, in which the entering into such agreements was not in terms prohibited.

"It is also urged that the debates in Congress show beyond a doubt that the Act as passed does not include railroads. * * * If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation. * * * A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the mem-

bers of Congress, and that railroads and their manner of doing business was wholly excluded therefrom.

U. S. vs. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. Ed. 1007.

See also:

U. S. vs. Joint Traffic Assn., 76 Fed Rep. 895.

Compare ruling in 171 U. S. 505, 43 L. Ed. 259.

That freight rate advances have been the result of agreements between carriers in violation of the so-called Anti-Trust Act, raising a presumption that such rates were unreasonable, has been urged in cases before the Commission, but that tribunal has uniformly held that it has no power in the enforcement of the anti-trust legislation so that if the rates were advanced by such an agreement, that fact does not furnish a foundation upon which the Commission may base a finding that they are unlawful under the Act to Regulate Commerce.

R. R. Comm. of Texas vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 463, 465.

See also:

Financial Relations etc., L. & N. R. R. Co., 33 I. C. C. Rep. 168. (Senate Resolution 153, November 6, 1913.)

Financial Transactions of N. Y. N. H. & H. R. R. Co., 31 I. C. C. Rep. 32, 66.

Lumber Rates from Oregon and Washington, 29 I. C. C. Rep. 609, 618.

Rates on Green Fruit from Idaho, 29 I. C. C. Rep. 650, 651.

§ 5. Amendment Affecting Railroad Ownership of Competing Water Carriers.

The last four paragraphs of section 5 of the Act to Regulate Commerce were added by the amendatory section 11 of the Panama Canal Act approved August 24, 1912, prohibit a railroad company or other common carrier sub-

ject to the Act from owning, leasing, operating, controlling, or having any interest, directly or indirectly, in any common carrier by water or any vessel carrying freight or passengers with which said railroad or other carrier does or may compete for traffic. It is provided that if the Commission shall be of opinion that such service by water, other than through the Panama Canal, is operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that a continuance thereof will neither exclude, prevent, nor reduce competition on the route by water, it may by order extend the time during which such service by water may continue to be operated.

In interpreting these provisions the Commission held that the competition or possibility of competition referred to is not a vague, indefinite, or remotely possible competition, but something real and substantial. The Commission has felt that where the competition or possible competition was remote, improbable, or negligible, and where the service was being operated in the interest of the public, and was of advantage to the convenience and commerce of the people, and a continuance thereof would neither exclude, prevent, nor reduce competition on the route by water, they should permit such continuance. But where the competition is real and substantial and it is not clearly shown that a continuance of the service will neither exclude, prevent, nor reduce competition on the route by water, it has no power to abate the prohibition against such continued common ownership, control, or operation.

Cases of this kind have come forward in which the competition is real, substantial, and not denied, but in which there is abundant testimony on behalf of shippers and

shipping interests generally in the territory served, frequently not contradicted in any degree, to the effect that the service is in the interest of the public and of advantage to the convenience and commerce of the people, and that a discontinuance thereof would be substantially injurious to them and to their localities instead of working any public benefit.

Thus:

The Pennsylvania Railroad Co. indirectly owns and operates certain steamship lines plying upon Chesapeake Bay and tributary rivers on the eastern shore of the bay. These boats compete for traffic at various points with railroads which are also owned or controlled by the Pennsylvania Railroad Co. After full hearing the Commission decided that continued operation of these boats under ownership by the Pennsylvania Railroad would be in violation of the Act and denied its application. When, pursuant to its order, notice was given of a discontinuance of the water service, shippers generally who had been and were being served by the water lines, including some of the original opponents of the application for permission to continue ownership and operation, petitioned for a rehearing and strongly urged that a continuance of the common ownership, control, and operation be permitted for another year at least. In this connection it was asserted that there was no one prepared to take over and operate the boats, no prospect of any service being furnished in lieu of that which had been and was being performed by the railroad owned boats, and that the discontinuance of the railroad ownership and operation would seriously injure the communities, individuals, and firms which had patronized and to a large extent depended upon the boat-line transportation.

Among the applications involved in the Lake Line Cases was that of the Grand Trunk Railway Co. of Canada for permission to continue ownership and operation of the Canada-Atlantic Transit Co. The stock of this water line is owned by the applicant. Its boats operate between Chicago, Ill., and Milwaukee, Wis., on the west, and Depot Harbor, Canada, on the eastern shore of Georgian Bay, at which point they connect with a railroad which is also owned by the Grand Trunk. A rehearing was granted in this case, which presents some international questions, and upon the rehearing literally hundreds of shippers and representatives of shipping interests testified that the boat-line service is in the interest of the public and of advantage to the convenience and commerce of the people; that if it is discontinued there is nothing to take its place; and that the communities that have been or are being served via that route will lose all of the advantages of the water route and of a competing route, while no advantage will accrue to any interests, localities, or persons.

The New York, New Haven & Hartford Railroad System is made up of various formerly independent lines of rail and water carriers. By purchases and consolidations the New Haven company has become the owner of various water lines, operated mainly between New England points and New York Harbor, which compete directly with its rail lines between the same points. There is no question as to the competition, but the record is replete with evidence from shippers and representatives of communities in New England to the effect that the service is in the interest of the public, is of advantage to the convenience and commerce of the people, and if the present ownership and operation is discontinued there will be no reasonably adequate service to take its place and the communities will be

deprived of the benefits of the water transportation and the competing routes, thus inflicting upon them irreparable injury and benefiting no one.

The Interstate Commerce Commission, in its annual report for 1916, referring to these conditions, said:

"We think that these facts should be brought to the attention of Congress, so that in the light of those facts it may determine whether or not authority shall be conferred upon the Commission to permit, in such cases and under such circumstances, a continuance of the railroad ownership, control, or operation of the water lines, subject to such further and different orders as the Commission may subsequently enter upon a further hearing and a showing of substantially changed circumstances and conditions.

In Application of Southern Pacific Company in re Operation of Steamship Company, 32 I. C. C. Rep. 690, 693, the Commission, addressing itself to the issue of present and possible competition, said:

"Section 5 of the Act to Regulate Commerce, as amended by what is known as the Panama Canal Act, among other things, provides that—

'From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad

or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

'Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier.'

"The language 'does or may compete for traffic' and 'possibility of competition' is strong and significant. Considering the whole Act and its manifest purpose to disassociate railroads from competing water lines as described therein, these phrases evidently mean that one purpose of the inquiry by this Commission shall be to ascertain whether under existing conditions there is competition or whether there may be competition if the railroad interest in the water carrier or vessel is eliminated.

"This section of the Panama Canal Act indicates, among other things, a clear, unmistakable policy, adopted by Congress, to separate from railroad ownership, control, or influence such common carrier water lines, and such vessels, as may, when thus separated, compete with the present owning or controlling companies, except where, upon investigation, it is found by the Commission that the existing service by water, other than through the Panama Canal, is being operated in the interest of the public, is of advantage to the convenience and commerce of the people, and that its continuance will neither exclude, prevent, nor reduce competition on the route by water. This being so, a construction of the Act must be adopted which will properly and effectively carry out the purpose of Congress. The Commission may not nullify or weaken the force of the plain intentment of the Act for any reasons, however plausible they may appear to be. The words 'may compete for traffic' do not mean a vague, possible though improbable competition, but mean a probable, potential competi-

tion, as when the water line is entirely divorced from the railroad. We must, therefore, look at the conditions as they will exist if this divorce is effected. From a practical view the question is, Will the steamship company, when free to consult only its own interests, compete for traffic with the railroad line? In the light of experience this will not be a difficult question to determine in most cases. Self-interest will surely develop an effort to secure desirable traffic—traffic that will produce revenue for the carrier.

“It must be observed that the competition is ‘for traffic.’ There are no words of limitation in this clause; it covers all interstate coastwise or foreign traffic.

In the **Lake Lines Divorce Case**, 33 I. C. C. Rep. 699, 700, the Commission had before it applications of certain railroads under the Panama Canal Act for an extension of time during which their interest in and operation of certain boat lines plying on the Great Lakes might be continued. The Commission found that the physical fact of ports of call being served in common by the boats and the paralleling rails of the owning railroad establishes a case of competition existing between the owning railroad and its boat line; that where an owning railroad is a party to through all-rail routes or a member of “fast freight lines” or an association of railroads owning boat lines whose function is to keep the operation of their boat lines from interfering with the rail operations, the interest it thus maintains in common with the rail carriers whose rails do compete with its boat lines is such an interest as the Act provides against, and that it is possible for such an owning railroad to compete with its boat line for traffic, within the meaning of the Act; that the purpose of the Panama Canal Act was to preserve to the common interest of the people, free and unfettered, the “water roadbed” via the

Panama Canal. Also to restore all the water routes of the country to the same condition of freedom from domination that would reduce their usefulness as a natural means of transportation; and that Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying upon the country's water routes. The Commission thereupon held that upon the respective records concerned, none of the several existing specified services by water was being operated in the interest of the public or was of advantage to the convenience or commerce of the people within the meaning of the Act, and that an extension of the respective interests of the petitioners therein would prevent, exclude, and reduce competition on the Great Lakes. The application of each of the petitioners herein was therefore denied, effective December 1, 1915.

Subsequently the taking effect of the order in the **Lake Lines Divorce Case** was postponed by the Commission and it is largely in view of the impairment of the efficiency of these boat lines which would inevitably result from the enforcement of the Commission's order that it called the attention of Congress to the necessity for further legislation on the subject consonant with the substantially changed circumstances and conditions.

Lake Line Applications under Panama Canal Act, 37 I. C. C. Rep. 77.
I. C. C. Ann. Rep. 1916, pp. 63-65.

See also:

Peninsular & Occidental S. S. Co., 38 I. C. C. Rep. 662.
Steamship "Great Northern," 37 I. C. C. Rep. 260.
The Boat "H. B. Plant," 37 I. C. C. Rep. 453.
The Ocean Steamship Co., of Savannah, 37 I. C. C. Rep. 422, 430.
Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432, 441.

- Southern Pacific Co., Ownership of Oil Steamers, 37 I. C. C. Rep. 528, 537.
- Steamer Lines on the Chesapeake Bay, etc., 35 I. C. C. Rep. 692, 701.
- Rates in Chicago Switching District, 34 I. C. C. Rep. 234, 247.
- C. & E. R. R. Co., Ownership of Water Equipment, 34 I. C. C. Rep. 218, 220.
- P. Co., Operation of P. Co.,-Ontario Transp. Co., 34 I. C. C. Rep. 47, 48.
- G. T. Ry. Co., of Canada, Operation of Ontario Car Ferry Co., Ltd., 34 I. C. C. Rep. 49, 51.
- B. R. & P. Ry. Co., Operation of Ontario Car Ferry Co., 34 I. C. C. Rep. 52, 54.
- G. T. W. Ry. Co., Operation of Grand Trunk Milwaukee Car Ferry Co., 34 I. C. C. Rep. 54, 57.
- S. P. Co., Ownership of Oil Steamers, 34 I. C. C. Rep. 77, 82.
- A. A. R. R. Co., Operation of Car-Ferry Boats, 34 I. C. C. Rep. 83, 85.
- P. M. and B. & L. E. R. R.'s Operation of Car-Ferry Boats, 34 I. C. C. Rep. 86, 89.
- O.-W. R. R. & N. Co., Ownership of S. F. & P. S. S. Co., 34 I. C. C. Rep. 165, 168.
- S. P. Co., Steamboats on the Sacramento River, 34 I. C. C. Rep. 174, 178.
- Erie R. R., Operation of Lake Keuka Nav. Co., 34 I. C. C. Rep. 212, 213.
- Joint Ownership of Mackinac Transp. Co., 34 I. C. C. Rep. 229, 230.
- S. P. Co., Ownership of Sacramento Transp. Co., 34 I. C. C. Rep. 648, 651.
- Commodity Rates to Pac. Coast Terminals, 34 I. C. C. Rep. 13, 20.
- Ownership of D. P. & A. Nav. Co., 33 I. C. C. Rep. 462, 467.
- Financial Relations, etc., L. & N. R. Co., etc., 33 I. C. C. Rep. 168, 265.
- S. P. Co., Ownership of Schooner "Pasadena," 33 I. C. C. Rep. 476, 479.
- Ownership of Boat Line on Lake Tahoe, 33 I. C. C. Rep. 426, 427.
- Transcontinental Commodity Rates to Points in California, 32 I. C. C. Rep. 449, 457.
- Commodity Rates to Pacific Coast Terminals, 32 I. C. C. Rep. 611, 658.
- Application S. P. Co., in re Operation Pac. Mail S. S. Co., 32 I. C. C. Rep. 690, 700.
- In re Wharfage Facilities at Pensacola, Fla., 27 I. C. C. Rep. 252, 266.
- A. & S. Steamboat Co. vs. Ocean S. S. Co., 26 I. C. C. Rep. 380, 394.

CHAPTER V.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 6.

- § 1. Statutory Provisions.
- § 2. Subjective Analysis of Section 6.
- § 3. Amendments to Section.
- § 4. Published Rates Must Be Observed.
- § 5. Distinction between Legal Rate by Publication and Lawful Rate.
- § 6. Purpose of Publication.
- § 7. Contents of Published Tariffs and Schedules.
- § 8. Posting of Tariffs and Schedules.
- § 9. Absence of Published Rate.
- § 10. Publication of Through Rates.
- § 11. Authority of Interstate Commerce Commission to Modify Tariff Requirements of Section 6.
- § 12. Publication of Through Rates.
- § 13. Enlarged Jurisdiction of the Commission Over Water Carriers.



CHAPTER V.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 6.

§ 1. Statutory Provisions.

(Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.) "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or

Printing and posting of schedules of rates, fares, and charges including rules and regulations affecting the same, icing, storage, and terminal charges, and freight classifications.

the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Printing and posting of schedules of rates on freight carried through a foreign country.

"Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to the customs duties as if said freight were of foreign production.

Freight subject to customs duties in case of failure to publish through rates.

Thirty days' public notice of change in rates must be given.

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public

inspection: **Provided**, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Commission may modify requirements of this section.

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Joint tariffs must specify names of carriers participating. Evidence of concurrence.

"Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

Copies of contracts, agreements, or arrangements relating to traffic must be filed with Commission.

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

Commission may prescribe forms of schedules.

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or

No carrier shall engage in transportation unless it files and publishes rates, fares, and charges thereon.

Published rates to be strictly observed.

remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: **Provided,** That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'

"That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

"The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal

"Carrier" means
"common car-
rier."

Preference and
expedition of
military traf-
fic in time of
war.

Amendment of
June 18, 1910.

Commission may
reject certain
schedules.

Penalty for fail-
ure to comply
with regula-
tion.

Carrier to fur-
nish written
statement of
rate.

or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Penalty for misstatement of rate.

"It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: 'The Station Agent of the.....Company at.....Station,' together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

Name of carrier's agent to be posted.

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

Amendment of August 24, 1912.

Commission has jurisdiction over rail and water traffic in certain particulars.

Physical connection between rail lines and dock of water carriers.

“(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

Commission may determine terms and conditions of construction and operation.

“The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

Through routes and joint rates between rail and water carriers.

“(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

Proportional rates to and from ports.

“(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

Through routes and joint rates between rail and water carriers from a port in the United States to a foreign country via Canal.

“(d) If any rail carrier subject to the Act to Regulate Commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal

or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to Regulate Commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to Regulate Commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Proceedings before the Commission to enforce these amendments.

§ 2. Subjective Analysis of Section 6.

Th unusual number of subjects referred to in section 6 renders the following subjective analysis of assistance in comprehending the full scope of the section:

Printing and posting of schedules of rates, fares and charges including rules and regulations affecting the same, icing, storage, and terminal charges, and freight classification.

Printing and posting of schedules of rates on freight carried through a foreign country.

Freight subject to customs duties in case of failure to publish through rates.

Thirty days' public notice of change in rates must be given.

Commission may modify requirements of this section. Joint tariffs must specify names of carriers participating. Evidence of concurrence.

Copies of contracts, agreements or arrangements relating to traffic must be filed with Commission.

Commission may prescribe forms of schedules.

No carrier shall engage in interstate transportation unless it files and publishes rates, fares and charges thereon.

Published rates must not be departed from.

"Carrier" means "common carrier."

Preference and expedition of military traffic in time of war.

Commission may reject schedules.

Penalty for failure to comply with regulations of Commission.

Carrier to furnish written statement of rate.

Damages for misstatement of rate.

Name of carrier's agent to be posted.

Commission has jurisdiction over rail and water traffic and dock of water carriers.

Commission vested with authority to determine terms and conditions of construction and operation of rail and dock connections.

Commission may establish through routes and joint rates between rail and water carriers.

Proportional rates to and from ports.

Through routes and joint rates between rail and water carriers from a port in the United States to a foreign country via Canal.

Proceedings before Commission to enforce Amendments of August 24, 1912.

§ 3. Amendments to Section.

The effect of the amendment of 1906 was practically to substitute a new section 6 in the Act to Regulate Commerce. The section had been extensively amended prior to 1906, and was later amended June 18, 1910, and on August 24, 1912.

The first amendment of the section in 1889 provided for the printing of tariffs and schedules and their posting

in two public and conspicuous places. This amendment also prohibited reductions of rates except upon three days' notice and extended the power of the Commission in prescribing different schedules for rates, fares and charges.

The Elkins Act of 1903 also amended the section by adding to the publication requirement and compelling the strict observance of published rates.

In the amendment of 1906 an essentially new section was enacted. This amended section does not provide the detail of specifications for tariffs or schedules of rates, that authority being invested in the Commission for administrative promulgation. The new section imposes upon common carriers, subject to the provisions of the Act, the duty of establishing in prescribed form, the rates, whether local or joint, to be charged for the transportation in interstate commerce of property over their lines, and the rates so established are obligatory upon both the carrier and shipper and must be strictly observed by both until changed in the manner prescribed.

Under the amended section joint rates are required to be published, and changes can only be made in rates upon thirty days' notice, discretionary authority however, being lodged in the Commission to permit changes in published rates on less than this statutory period of notice. But the Commission's discretion is to be exercised only in cases of extraordinary necessity, and not for the purpose of aiding a shipper in any ordinary commercial exigency.

The separate publication of charges for accessorial and incidental services was required, the publication and posting of such schedules to conform with the tariff regulations of the Commission, it having authority to change the

requirement in a specific case if, in its discretionary judgment, the necessity existed.

Constitutionally, the amended section meant that Congress had adopted, as it alone had the power to do, a policy of requiring the sale of transportation by carriers only for cash at the published rates and had vested in the Commission the means to give such policy effect.

The amendment to the section of June 18, 1910, empowers the Commission to reject tariffs without effective dates, and penalizes the carrier for failure to comply with the Commission's tariff rules and regulations, promulgated under the authority of the section. The 1910 amendment also requires carriers to furnish a written quotation of a rate upon written request from the shipper, and to post the name of the carrier's agent in any station where freight is received for transportation.

The 11th section of the Panama Canal Act of August 24, 1912, amended section 6 of the Act to Regulate Commerce prohibiting monopolistic control by railroads of water carriage and effecting a coordination of terminals at points where water and rail lines meet.

The section, as now amended by the Panama Canal Act, brings the regulation of wharf facilities at ports within the jurisdiction of the Commission, imposes upon it the duty of determining what vessels shall use these facilities, the terms and conditions of such use, and gives it power to establish through routes and maximum joint rates between and over rail and water lines.

Act to Regulate Commerce, as amended.
Elkins Act, as amended.
Panama Canal Act.

See also:

Lake Line Applications under Panama Canal Act, 33 I. C. C.
Rep. 699, 712.

- L. & N. R. R. Co. vs. Mottley, 219 U. S. 467, 468.
In re Wharfage Facilities at Pensacola, Fla., 27 I. C. C. Rep. 252, 259.
Augusta & Savannah Steamboat Co. vs. O. S. S. Co. of Savannah, 26 I. C. C. Rep. 380, 384.
Acme Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 22 I. C. C. Rep. 283, 285.

§ 4. Published Rates Must Be Observed.

Section 6 makes conclusive upon the carrier the rates and charges published and filed with the Interstate Commerce Commission in accordance with the provisions of the section and the tariff regulations of the Commission. The law imposes the duty upon the carrier to know and quote rates in accordance with those so published and holds the carrier liable to penalty for misstatement of its rates. The Commission, however, is without power to award damages to the shipper for misquotation of rates, since the penalty accrues to the government and not to the shipper for whom no specific redress is provided, except in the general terms of section 8 of the Act to Regulate Commerce.

See "Damages," *post*.

Ohio Iron & Metal Co. vs. Wab. R. R. Co., 18 I. C. C. Rep. 299, 300.

The published rate in itself is a contract with all the world at the specified rate of charge and may not be changed or modified by the carrier or shipper, or both combined, except in the manner provided by law. The Act to Regulate Commerce deprives carriers and shippers of the power to make individual contracts by substituting one uniform contract for transportation which is filed with the Commission. Not only is the effect of the Act to charge the shipper with knowledge of the legal rates but the Supreme Court has declared the shipper must take

notice of the legal rate to be charged on his shipment and that actual want of knowledge is no excuse.

- Geo. N. Pierce Co. vs. Wells Fargo & Co., Exp., 236 U. S. 278, 59 L. Ed.—
 A. T. & S. F. Ry. Co. vs. Robinson, 233 U. S. 173, 58 L. Ed. 901.
 G. N. Ry. Co. vs. O'Connor, 232 U. S. 508, 58 L. Ed. 703.
 A. T. & S. F. Ry. Co. vs. Moore, 232 U. S. 182, 58 L. Ed. 906.
 K. C. S. Ry. Co. vs. Carl, 227 U. S. 639, 57 L. Ed. 683.
 L. & N. R. Co. vs. Mottley, 219 U. S. 467, 55 L. Ed. 297.

See also:

- T. & P. Ry. Co. vs. Mugg, 202 U. S. 242, 50 L. Ed. 1011.
 Armour Packing Co. vs. U. S. 153 Fed. Rep. 18. (209 U. S. 56, 52 L. Ed. 681.)
 Pond-Decker Co. vs. Spencer, 86 Fed. Rep. 846.
 R. R. Comm. etc. vs. A. A. R. R. Co., 17 I. C. C. Rep. 418.
 Wichita & West. Ry. Co., of Texas vs. Asher, 171 Southwest Rep. 1114, 1120.
 Mott Stor. Co. vs. St. L. & S. F. R. R. Co., 168 Southwest Rep. 322.
 T. & P. Ry. Co. vs. Dickson Bros., 167 Southwest Rep. 33.
 C. of Ga. Ry. Co. vs. Birm. Sand & Brick Co., 64 Sou. Rep. 202.
 S. P. Co. vs. Fry & Bruhn, 143 Pac. Rep. 163, 164.

Compare:

- Virginia-Carolina Peanut Co. vs. A. C. R. Co., 82 Southeast Rep. 14, holding that "publication" means "promulgation and distribution" and is not confined to merely scheduling with the Commission, it being something besides that or in addition to it.
 Louisiana Sugar Planters' Assn. vs. I. C. R. Co., 34 I. C. C. Rep. 253, 254, holding that a tariff is not self-operative to the effectual prevention of the possibility of fraud. It is the part of the carriers to take the necessary precautions to preserve the integrity of the published rates.

See also:

- Peters Mill Co. vs. C. B. & Q. R. R. Co., 38 I. C. C. Rep. 245, 248.
 Goldfield Cases, 34 I. C. C. Rep. 360, 378.
 Reeves Coal Co. vs. C. M. & St. P. Ry. Co., 34 I. C. C. Rep. 122, 123.
 Floridin Co. vs. Seaboard Air Line Ry. Co., 21 I. C. C. Rep. 610.
 Clinton Bridge & Iron Works vs. C. B. & Q. R. R. Co., 20 I. C. C. Rep. 416, 417.

- In re Substitution of Tonnage at Transit Points, 18 I. C. C. Rep. 280, 296.
 Old Dominion Copper Mining & Smelting Co. vs. Penn. R. R. Co., 17 I. C. C. Rep. 309, 312.
 In re Contracts of Express Companies, 16 I. C. C. Rep. 246, 249.
 California Commercial Assn. vs. Wells, Fargo & Co., 16 I. C. C. Rep. 458, 461.
 Ames Brooks Co. vs. Rutland R. R. Co., 16 I. C. C. Rep. 479, 481.
 Nebraska-Iowa Grain Co. vs. U. P. R. R. Co., 15 I. C. C. Rep. 90, 98.
 St. L. & S. W. Ry. Co. of Texas vs. Spring River Stone Co., 154 S. W. Rep. 465, 467.
 Ford vs. C. R. I. & P. Ry. Co., 143 N. W. Rep. 249.
 I. C. R. R. Co. vs. Henderson Elevator Co., 127 S. W. Rep. 779.
 C. & O. Ry. Co. vs. Maysville Brick Co., 116 S. W. Rep. 1183.
 La. Ry. & Nav. Co. vs. Holly, 53 So. Rep. 882.
 Sutton vs. St. L. & S. F. R. R. Co., 140 S. W. Rep. 76.
 Pecos Valley & N. E. Ry. Co. vs. Harris, 94 Pac. Rep. 951.
 Houseman vs. Fargo, 124 N. Y. Supp. 1086, 1088.
 Ochsenreiter vs. A. T. & S. F. Ry. Co., 33 I. C. C. 518, 519.
 Franke Grain Co. vs. I. C. R. R. Co., 27 I. C. C. Rep. 625, 627.
 American Brake Shoe & Foundry Co. vs. A. G. S. R. R. Co., 26 I. C. C. Rep. 446, 448.
 Humboldt S. S. Co. vs. White Pass & Yukon Route, 25 I. C. C. Rep. 136, 140.
 C. W. Hull Co. vs. S. Ry. Co., 24 I. C. C. Rep. 302, 303.
 St. Louis Blast Furnace Co. vs. Va. Ry. Co., 24 I. C. C. Rep. 361.
 Dietz Lumber Co. vs. A. T. & S. F. Ry. Co., 22 I. C. C. Rep. 75, 76.

See also:

- I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 2, 4, 5, 6, 12, 13, 19, 28, 31, 33, 34, 36, 50, 65, 70, 73, 75, 77, 78, 80, 86, 90, 93, 95, 100, 101, 104, 106, 113, 114, 119, 128, 130, 132, 135, 136, 141, 143, 145, 146, 148, 166, 167, 177, 178, 180, 181, 183, 184, 190, 191, 192, 194, 195, 198, 202, 205, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 220, 223, 228, 229, 239, 244, 252, 267, 269, 276, 281, 292.
 G. C. & S. F. R. R. Co. vs. Hefley, 158 U. S. 98.

§ 5. Distinction Between Legal Rate by Publication and Lawful Rate.

Read together, the prohibition of section 1 against unreasonable rates and the provisions of section 6 giving conclusive legal effect to a published rate, on their face

seem anomolous. A rate becomes a legal rate simply by publication and filing with the Commission in accordance with the requirements of section 6 and the regulations of the Commission. This action, however, does not look to the nature of the rate, whether it is a reasonable or unreasonable one. The filing of a rate schedule with the Commission raises no presumption of the lawfulness of the rate contained therein. Publication is but a means of insuring to the shipper sufficient notice of what the rate will be and that the rate so published shall be the only rate the carrier may impose. Hence, a rate by publication merely becomes legally fixed and the question of its unreasonableness may be raised at any time by complaint to the Commission, or, the Commission may investigate its reasonableness upon its own initiative.

§ 6. Purpose of Publication.

The effect of publication is to fix with certainty the legal and only rate the carrier may impose for its service. This effect of legalizing the rate and the position of the shipper is not inconsistent. A carrier is presumed to know its own rates and were it permitted to quote a different rate than which it has published and filed with the Commission, the whole purpose of the section in giving certainty and stability to rates would be perverted and the protection of the shipper would become nil.

Rates should be published in such manner as to apprise shippers of their existence and the law presumes the shipper thereafter to know such rates, in fact, interstate commerce may not be lawfully transacted by common carriers and shippers unless such carriers first file their schedules, rules and regulations with the Commission, after

which neither they nor their patrons may deviate from them.

In enacting section 6 of the Act to Regulate Commerce the evident purpose of Congress was to establish uniform rates for transportation,—“to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No charge could be made in the rates embraced by the schedules except upon notice to the Commission and public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.”

It is the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. Money only is receivable for transportation, for the prohibition against the charging or collecting a greater or less or **different** compensation than the established rates in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules. As was said in the **Goodridge Case**, “so opposed is the policy of the Act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will

exact of him for a particular service, but what it exacts of everyone else for the same service, so that in fixing his own prices he may know precisely with what he has to compete."

Union Pac. Ry. Co. vs. Goodridge, 149 U. S. 680, 691, 37 L. Ed. 896.

It is manifest, therefore, that the legislative intentment was that all who obtained transportation on interstate railways should be treated alike in the matter of rates and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. To give effect to this purpose is the all-prevailing premise of section 6 requiring publication of carriers' rates and charges.

L. & N. Ry. Co. vs. Mottley, 219 U. S. 467, 55 L. Ed. 297.

C. I. & L. Ry. Co. vs. U. S., 219 U. S. 486, 55 L. Ed. 305.

See also:

C. & W. C. Ry. Co. vs. Thompson, 234 U. S. 576, 58 L. Ed. 1476.

K. C. S. Ry. Co. vs. Carl, 227 U. S. 639, 57 L. Ed. 683.

C. & A. R. R. Co. vs. Kirby, 225 U. S. 155, 165, 56 L. Ed. 1033.

N. Y. C. & H. R. R. Co. vs. U. S., 212 U. S. 481, 495, 53 L. Ed. 613.

Amer. Exp. Co. vs. U. S., 212 U. S. 522, 53 L. Ed. 635.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 533.

I. C. C. vs. C. & O. Ry. Co., 200 U. S. 361, 391, 50 L. Ed. 515.

G. C. & S. F. Ry. Co. vs. Hefley, 158 U. S. 98, 102, 39 L. Ed. 910.

M. P. Ry. Co. vs. Goodridge, 149 U. S. 680, 37 L. Ed. 896.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 207.

Harris vs. Sou. Ry., 85 Southeast Rep. 158, 159.

Crane R. R. Co. vs. C. of N. J., 93 Atl. Rep. 1076, 1077.

Zoller Hop Co. vs. S. P. Co., 143 Pac. Rep. 931, 933.

Pecos & N. T. Ry. Co. vs. Porter, 156 Southwest Rep. 267, 272.

O. W. R. R. & N. Co. vs. Thisler, 133 Pac. Rep. 539.

O. W. R. R. & N. Co. vs. Coolidge, 116 Pac. Rep. 93, 95.

Peters Mill Co. vs. C. B. & Q. R. Co., 38 I. C. C. Rep. 245, 248.

Western Trunk Line Rules, 34 I. C. C. Rep. 554.

White vs. Western Union Telegraph Co., 33 I. C. C. Rep. 500, 502.

- Chamber of Commerce of Houston, Tex., vs. I. & G. N. Ry. Co., 32 I. C. C. Rep. 247, 260.
Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 416.
Transcontinental Commodity Rates, 26 I. C. C. Rep. 456, 465.
Buren vs. S. P. Co., 26 I. C. C. Rep. 332, 334.
Crescent Coal Mining Co. vs. C. & E. I. R. R. Co., 24 I. C. C. Rep. 149, 157.
St. Louis Blast Furnace Co. vs. Virg. Ry. Co., 24 I. C. C. Rep. 360, 371.
In re Mileage, Excur. & Commutation Tickets, 23 I. C. C. Rep. 95, 97.
Red River Oil Co. vs. T. & P. Ry. Co., 23 I. C. C. Rep. 438, 448.
Johnson vs. M. St. P. & S. S. M. Ry. Co., 22 I. C. C. Rep. 255, 258.
Ford Co. vs. M. C. R. R. Co., 19 I. C. C. Rep. 507, 511.
Associated Jobbers of Los Angeles vs. A. T. & S. F. Ry., 18 I. C. C. Rep. 310, 332.
Folmer & Co. vs. G. N. Ry. Co., 15 I. C. C. Rep. 33, 36.
In re Allowances for Transfer of Sugar, 14 I. C. C. Rep. 619, 629.

§ 7. Contents of Published Tariffs and Schedules.

Under this requirement of the section that schedules be published and filed with the Commission and providing that they "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, and all privileges or facilities granted or allowed," it was not intended that the carrier should be required to state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of the line. The terminal charges referred to in section 6, and which must be expressly set forth in the carriers' tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching and cartage.

Associated Jobbers of Los Angeles vs. A. T. & S. F. Ry. Co., 18 I. C. C. Rep. 310, 315.

To prevent discrimination and promote equality to treatment in charges and services, the law requires not only a definite statement of the amount of the rates, fares and

charges of carriers in their established schedules, but an equally definite statement therein of all privileges and facilities granted or allowed in connection therewith, and any rules or regulations which in any wise affect or determine any part or the aggregate of the rates, fares, or charges, or the value of the service rendered to the passenger, shipper or consignee. It is clear that no schedule complies with the requirements of the law which does not definitely and fully state the charges on the one hand and the services to be rendered therefor on the other.

In re Mileage, Excursion and Commutation Tickets, 23 I. C. C. Rep. 95.

The schedules and tariffs published and filed by the carriers under this section shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee.

Act to Reg. Com., section 6, paragraph 1.

§ 8. Posting of Tariffs and Schedules.

The filing of a tariff or schedule with the Commission and the furnishing by the carrier of copies of its freight offices is incontrovertible evidence that the tariff of rates contained in the schedule have been established and put in force by the carrier as mentioned in the first sentence

of section 6 and the railroad company may not thereafter be heard to assert to the contrary. The requirement that schedules "be posted in two public and conspicuous places in every depot" was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a condition based upon the existence of an established rate and plainly had for its object the affording of special facilities to the public for ascertaining the rates **actually in force**. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative, nor is it a condition to the continued existence of a tariff once legally established. The logic of this reasoning is plain. If posting were a condition to make a tariff legally operative the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would establish or suspend the rates, a result which evidently is not intended by the Act, for it provides that rates once lawfully established cannot be changed other than in the manner prescribed.

U. S. vs. Miller, 223 U. S. 559, 56 L. Ed. 568.

K. C. S. Ry. Co. vs. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556.

T. & P. Ry. Co. vs. Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562.

See also:

Berwind-White Coal Co. vs. C. & E. R. R. Co., 235 U. S. 371, 59 L. Ed.—

K. C. S. Ry. Co. vs. Carl, 227 U. S. 639, 57 L. Ed. 683.

I. C. R. R. Co. vs. Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290.

Beahan vs. N. Y. C. & H. R. R. R. Co., 174 Southwest Rep. 150, 152.

Virg.-Carolina Peanut Co. vs. A. C. L. R. R. Co., 82 Southeast Rep. 14.

Hunter vs. St. L. & S. F. R. R. Co., 150 Southwest Rep. 733, 736.

- Nor. Ala. Ry. Co. vs. Wilson Merc. Co., 63 So. Rep. 34, 35.
 L. & N. R. R. Co. vs. Allen, 153 Southwest Rep. 198, 199.
 Wabash R. R. Co. vs. Priddy, 101 Northeast Rep. 724, 729.
 Cement Rates from Points in Ill. 32 I. C. C. Rep. 369, 375.
 Franke Grain Co. vs. I. C. R. R. Co., 27 I. C. C. Rep. 625, 629.
 Buren vs. S. P. Co., 26 I. C. C. Rep. 332, 334.
 Faribault Furn. Co. vs. C. G. W. R. R. Co., 25 I. C. C. Rep. 40, 41.
 Canadian Valley Grain Co. vs. C. R. I. & P. Ry. Co., 19 I. C. C. Rep. 108, 109.
 Rutland vs. C. R. I. & P. Ry. Co., 18 I. C. C. Rep. 509, 511.
 Pueblo Transp. Assn. vs. S. P. Co., 14 I. C. C. Rep. 82, 85.

See also:

- I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 86.

§ 9. Absence of Published Rate.

Section 6 of the Act, in terms, provides that "no carrier shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act." Therefore, interstate commerce cannot be transacted by common carriers unless they first file their schedules, rules, and regulations with the Commission, after which neither they nor their patrons may deviate from them, and a tariff or schedule of rates and changes not filed with the Commission is not valid as to interstate transportation.

- T. & P. Ry. Co. vs. Amer. Tie & Timber Co., 234 U. S. 138, 58 L. Ed. 1255.
 So Ry. Co. vs. Burl. Lumber Co., 225 U. S. 99, 56 L. Ed. 1001.
 So. Ry. Co. vs. Reid & Beam, 222 U. S. 444, 56 L. Ed. 263.
 So. Ry. Co. vs. Reid, 222 U. S. 424, 56 L. Ed. 257.
 K. C. S. Ry. Co. vs. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556.
 Zoller Hop Co. vs. S. P. Co., 143 Pac. Rep. 931.
 St. Louis Blast Furnace Co. vs. V. Ry. Co., 24 I. C. C. Rep. 360, 366.
 Johnson vs. M. St. P. & S. S. M. Ry. Co., 22 I. C. C. Rep. 255, 258.
 In re Mileage, Excursion and Commutation Tickets, 23 I. C. C. Rep. 95, 97.

See also:

Hagar Iron Co. vs. P. R. R. Co., 18 I. C. C. Rep. 529, 531.
Folmer & Co. vs. G. N. Ry. Co., 15 I. C. C. Rep. 33, 36.
O.-W. R. R. & N. Co. vs. Coolidge, 116 Pac. Rep. 93, 95.

§ 10. Publication of Through Rates.

Through and continuous lines imply through rates, which must be reasonable rates, and suitable instrumentalities of shipment and carriage. If two carriers make a thorough and continuous line or route and offer its use to the shipping public, they cannot break up the lines as to the component carriers and declare themselves carriers of their separate parts of the through route, in order to avoid responsibility for unreasonable rates or charges. When the movement of a shipment commences at its inception point over such a through route, the Commission regards its movement to final destination as an entirety.

§ 11. Authority of Interstate Commerce Commission to Modify Tariff Requirements of Section 6.

The Commission may, in its discretion and for good cause shown, allow changes upon less than the notice specified in section 6 of the Act, or modify the requirements of the section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or particular circumstances or conditions.

Act to Reg. Com., section 6, par. 3.

This authority was conferred by the amendment of 1906, as the Commission had ruled that excursion rates under section 22 of the Act were changes in rates. It is obvious that if 30 days' notice were to be required in the publication of excursion fares, the passenger business of

the carrier would be needlessly and injuriously interfered with. Excursion traffic is handled under different conditions than the general passenger traffic, and time is often the essence of the carrier's ability to secure the excursion traffic.

In an early case the Commission said the practical difficulty of enforcing the requirement of 30 days' notice under section 6 in the matter of export and import rates was due to the fact that the ocean rates were constantly varying and were not under the Commission's jurisdiction, and to hold the inland carrier to strict response to the requirements of section 6 would be manifestly unjust and injurious to its business interests so far as they related to export and import traffic.

I. C. C. Ann. Rep. 1904, p. 49 (also 10 I. C. C. Rep. 55).

The Commission seeks to limit the exercise of this discretionary power to cases where actual emergency and real merit are shown. The power is not to be lightly regarded, and it will not be exercised to aid a carrier in any strategic endeavor or to aid shippers in any ordinary commercial exigency.

Acme Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 22 I. C. C. Rep. 283, 285.

More than this the Act endows the Commission with plenary administrative power to supervise freight tariffs, and charges it with the duty to annul any tariffs in contravention of such Act, and generally to enforce the provisions thereof.

American Sugar Refining Co. vs. D. L. & W. Ry. Co., 200 Fed. Rep. 652.

In re Advances on Manganese Ore, 25 I. C. C. Rep. 663, 668.

§ 12. Publication of Through Rates.

In the amendment of June 29, 1906, provision was included in the sixth section requiring the carriers to make the same publication, posting and filing of joint as of local rates. In other words, a combination through rate is as binding, definitely and absolutely, as a joint through rate, and all the conditions, regulations and privileges obtaining as to any factor in such combination rate for through shipment at the time of initial shipment upon such combination through rate must be followed and cannot be varied during the period of such shipment to its final destination. If no through rate is established over a through route—which is defined to be a continuous line of railway formed by an arrangement, express or implied, between connecting carriers—the sum of the locals make up the through rate, but if a through rate is established for such through route, notice thereof must be given to the world by publication. There must be legal rates for each carrier participating in the through route before there can be a legal combination of rates to constitute a through rate, and as to such through rate as a unit, the publication provisions of section 6 in all things apply.

In re Through Routes and Through Rates, 12 I. C. C. Rep. 163, 172.

See also:

9 I. C. C. Rep. 182.

8 I. C. C. Rep. 316.

5 I. C. C. Rep. 44; 3 I. C. C. Rep. 706.

3 I. C. C. Rep. 465; 2 I. C. C. Rep. 729.

I. C. C. Ann. Rep. 1907, p. 75.

§ 13. Enlarged Jurisdiction of the Commission Over Water Carriers.

In the Panama Canal Act of 1912, the powers of the Commission with reference to the establishment of joint

arrangements between rail and water carriers were reaffirmed and enlarged. The Commission is now vested with jurisdiction over transportation from point to point in the United States by rail-and-water, through the Panama Canal or otherwise, and empowered to require physical connection between rail lines and docks of water carriers, determine the terms and conditions of operation of such connection, require the establishment of through routes and joint rates between rail and water carriers, and to require through routes and joint rates between rail and water carriers from a point in the United States to a foreign country, through the Panama Canal, or otherwise. Provision is also made for proceedings before the Commission to enforce these requirements and penalties provided, as under section 15 of the Act to Regulate Commerce, for failure to comply with the orders and regulations of the Commission therein.

In the proceedings known as the **Augusta & Savannah Steamboat Co. vs. Ocean Steamship Company of Savannah**, 26 I. C. C. Rep. 380, 394, the Commission held that the words, "or otherwise," in the 11th section of the Panama Canal Act of August 24, 1912, which is amendatory of section 6 of the Act to Regulate Commerce, modify the phrase "through the Panama Canal" and not the phrase "by rail and water."

CHAPTER VI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 7.

- § 1. Statutory Provisions.
- § 2. Interpretation of the Section.
- § 3. Relation of Sections 7 and 3.

CHAPTER VI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 7.

§ 1. Statutory Provisions.

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

Carriage of
freights must
be treated as
continuous un-
less stoppage is
in good faith.

§ 2. Interpretation of the Section.

In an early case (10 I. C. C. Rep. 188) the Commission viewed the provisions of section 7 as not being directed toward any apparent practice of the carriers in interference with the continuity of through and continuous shipments, but it was observed by the Commission that the section might relate to any attempt on the part of the carriers to break the continuity of continuous through shipments at state lines in order to divest such shipments of their interstate character.

In a more recent case the Commission, again referring to this section of the Act, said:

"Section 7 of the act to regulate commerce prohibits any arrangement whereby carriers may prevent the carriage of freight from being continuous from place of shipment to destination, or the carriage of freight from being and being treated as one continuous carriage from the place of shipment to the place of destination. It is not apparent that the requirements of the carriers respecting minimum weights operate in any way to contravene the law as expressed in this section of the act."

Douglas & Co. vs. I. C. R. R. Co., 31 I. C. C. Rep. 587, 606.

§ 3. Relation of Sections 7 and 3.

The purpose of the provisions of the third and seventh sections of the Act relating to interchange of traffic is to secure through carriage and the freest possible interchange of traffic along and over all lines and routes of carriers where the physical connections and conditions for such interchange exist, both in the interest of commerce and the impartial treatment of carriers connecting with each other.

The Supreme Court holds the provisions of section 7 which make it unlawful for interstate carriers by any means or devices to prevent the continuous carriage of freight from the place of shipment to the point of destination, as restrictive, only, of the powers of the carriers. So, in a case where a state court, by proper process and under state attachment laws, seized, and held the cars of an interstate carrier, irrespective of the possible interruption to interstate transportation resulting therefrom, it was held that there had been no violation of this statute. The Supreme Court, answering the defense of the carriers in the attachment case setting up the commerce clause of the

constitution and the seventh section of the Act to Regulate Commerce, said:

"In our discussion we may address ourselves to the contention of defendants. They do not contend that the laws of the state have the purpose to interfere with the interstate commerce, or are directly contrary to the Acts of Congress. They do contend, however, that 'to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the Acts of Congress.' In other words, that the Acts of Congress constitute a declaration of exemption of railroad property from attachment, and, of course, from execution as well, by reason of their provisions for continuity of transportation. This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the Acts of Congress. * * *

"It is very certain that when Congress enacted the Interstate Commerce Law it did not intend to abrogate the attachment law of the states. It is very certain that there is no conscious purpose in the laws of the states to regulate, directly or indirectly, interstate commerce. We may put out of the case, therefore, as an element an attempt of the state to exercise control over interstate commerce in excess of its power. * * * The questions in the case, therefore, depend for their solution upon the interpretation of Federal laws. May the laws of the states for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit and because they give support to commerce, state and interstate), and the Federal laws which permit or enjoin continuity of transportation, so far incompatible that the provisions of the latter must be construed as displacing the former. We do not think so. Section 5258 of the Revised Statutes is permis-

sive, not imperative. It removed the 'trammels interposed by state enactments or by existing laws of Congress' to the powers of railroad companies to make continuous lines of transportation. *Railroad Co. v. Richmond*, 19 Wall. 584, 589. The Interstate Commerce Act, however, has a different character. It restricts the powers of the railroads. It regulates interstate railroads, and makes it unlawful for them by any 'means or devices' to prevent 'the carriage of freight from being continuous from the place of shipment to the place of destination.' (Section 7) The interstate commerce law therefore is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors or take from their creditors any remedial process provided by the laws of the states, and, as we have seen, provided by Federal law as well. * * * The interference with interstate commerce by the enforcement of the attachment laws of a state must not be exaggerated. It can only be occasional and temporary. The obligations of a railroad company are tolerably certain, and provisions for them can be easily made. Their sudden assertion can be almost instantly met; at any rate, after short delay and without much, if any, embarrassment to the continuity of transportation. However, the pending case does not call for a very comprehensive decision on the subject."

Davis vs. C. C. C. & St. L. Ry. Co., 217 U. S. 157, 54 L. Ed. 708.
I. C. C. Annual Report 1895.

A carrier and its employees may be enjoined by the courts from refusing to receive passengers and freight from competing lines.

T. A. A. & N. M. Ry. Co. vs. Penn. Co., 54 Fed. Rep. 730.
T. A. A. & N. M. Ry. Co. vs. Penn. Co., 5 I. C. C. Rep. 545.

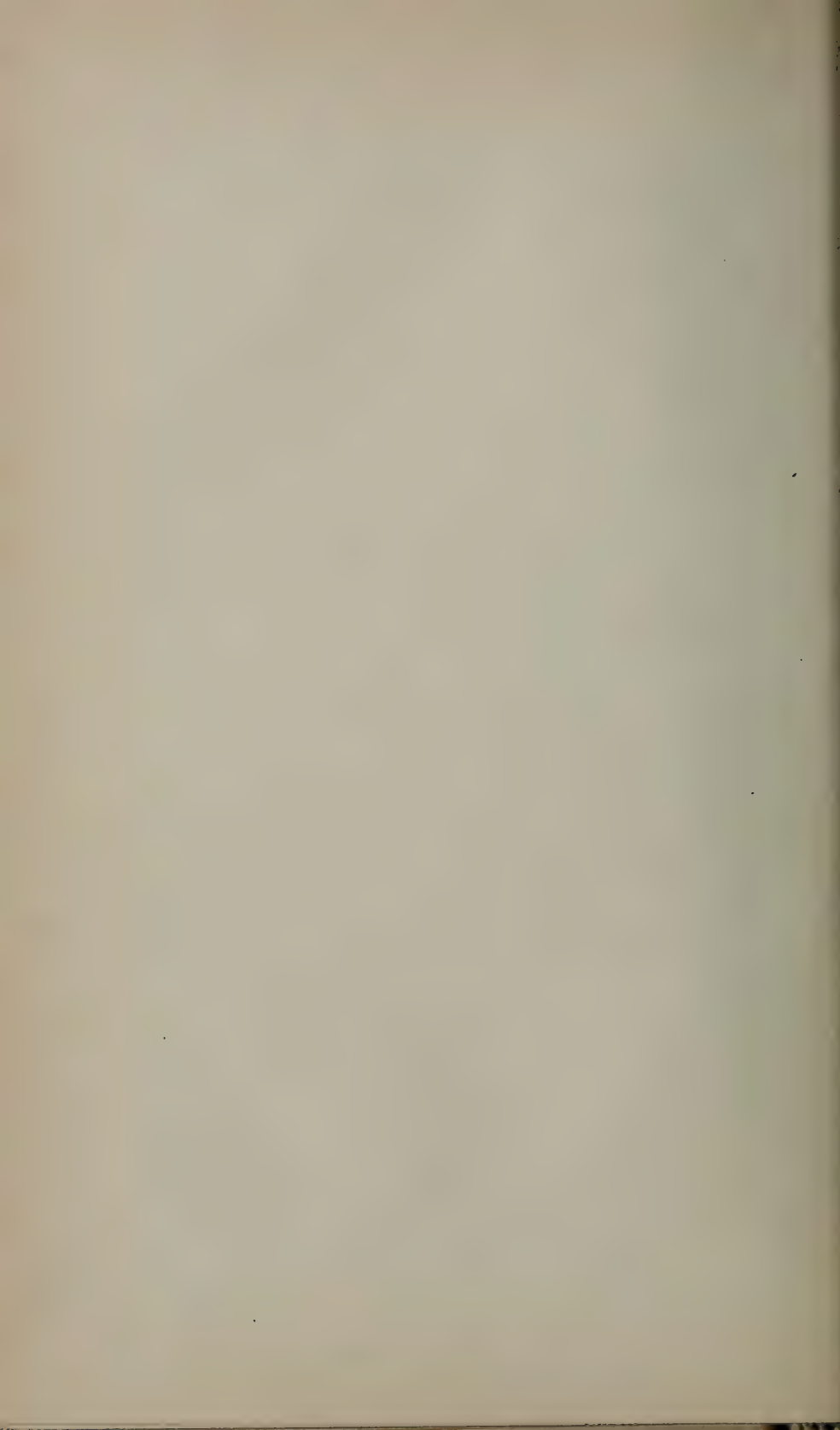
CHAPTER VII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 8.

- § 1. Statutory Provisions.
- § 2. Section Gives Right of Action.
- § 3. Equity Jurisdiction Under the Act to Regulate Commerce.
- § 4. Effect of State Statutes of Limitation.
- § 5. Assignment of Claims for Damages or Overcharges.
- § 6. Reference Paragraph.



CHAPTER VII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 8.

§ 1. Statutory Provisions.

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Liability of common carriers for damages caused by violation of this act.

§ 2. Section Gives Right of Action.

Section 8 gives a right of action at law for damages suffered by any person or persons injured by violation of the provisions of the Act to Regulate Commerce. The section should be read in conjunction with section 9 which provides the means for the recovery of such damages. The remedial provisions of the Act as now amended have detracted much from the importance of section 8 as the Act stood before the amendments of 1906 and 1910. Under

judicial construction of the statutory right of action afforded by section 8, strict proof is necessary not only of the violation of some provision of the Act to Regulate Commerce, but that the violation has, in fact, operated to the complaining person's injury. It is not enough to merely show that the carrier has violated some provision of the Act. The complaining party must affirmatively prove that he was injured by such violation.

Thus, in the case of an unreasonable rate, or discriminatory practice, it must be shown that not only was the unreasonable rate actually charged and collected or that the unjust discrimination was actually inflicted upon the complainant, but that he was actually injured hereby. A failure to file tariffs, unless such failure operates to do injury to the plaintiff and thereby causes him actual damage, is not sufficient to sustain a right of action under this section.

There is nothing in the Act to Regulate Commerce in which a presumption of damage can be inferred and the courts have never so held.

In *Penn. R. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446, the Supreme Court, in a case where the coal company had sued the carrier for the difference between the rates paid by the coal company and lower rates effected through rebates allowed to other coal dealers making like shipments between the same points over the same railroad, said:

"Section 2 of the original Senate bill said nothing about damages but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and section 8 of the Act, as passed by both Houses of Congress

and approved by the President, gave a right of action for damages and attorney's fees to 'the person injured'—and, of course, to the extent of the injury. There were many provisions in the statute for imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damages in favor of the plaintiff. But, as said in *Parsons v. Railway*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887, construing this section (8) 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the Act of June 18, 1910 provided that where a carrier misquotes a rate it should pay a penalty of \$250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418-421; 14 I. C. C. 82. * * *

"Indeed it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination. It thereby either first created the right or removed the doubt as to whether such suit could be brought. The English courts had held that a shipper, who paid a reasonable rate, had no cause of action because the carrier had charged a lower rate to another. * * * But the English courts make a clear distinction between overcharge and dam-

ages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have covered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

"Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under section 8 it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge to rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on the contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate or many times greater than the rebate. But unless they were proved they could not be recovered. Whatever they were they could be recovered, because section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fees.' In view

of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899. * * * There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as a matter of law the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.

“Considering the multitude of instances in which discrimination has been practised by carriers, in ancient and modern times, it is remarkable how little is to be found in decisions or text books which treat of the elements and measure of damages in such cases. In the absence of any settled rule on the subject, the new question must be determined on general principles. The statute gives a right of action for **damages** to the **injured** party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the Act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:—If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in such case being then entitled to recover the

full damages sustained:—But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered:—

“Or, to make another example—a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or \$3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price. Under the rule contended for it would then be entitled to 35 cents a ton on 20,000 tons, or \$7,000 as damages. Such a verdict, instead of compensating it for lossess sustained, would have given to the plaintiff a profit on the carrier’s crime in paying a rebate of \$3,500 and would have made it an advantage to it instead of an injury for the carrier to violate the law. In order to avoid this anomalous, yet logical, result it is now suggested, as in the overcharge cases (*Denaby v. Manchester Ry.*, L. R. II App. Cases 97) the plaintiff should only recover a rebate on 10,000 tons, or on the same weight upon which the carrier had allowed a drawback to the competitor. But, while less drastic, this is still an arbitrary measure and ignores the fact that the same anomalous result would follow if there had been, say, ten dealers, each shipping 10,000 tons on the same day. For, each of the ten would have been as much entitled as plaintiff to recover \$3,500 on their several shipments of 10,000 tons, and the ten verdicts would aggregate \$35,000, because of the payment of \$3,500 to the favored shipper.

“It is said, however, that while there may be no presumption that a shipper was injured because the carrier paid a rebate on a single shipment, or on an

occasional shipment, yet it could recover if rebates had been so habitually given as to establish a practice of discrimination. Proof that rebates were customarily paid, would come nearer showing that injury was suffered but would still fall short of proving the extent of the damage, and is not the theory on which the plaintiff proceeds. For it argues that whenever it showed that a lower rate had been charged on contract coal sold in 1899 it was entitled to recover the same rate on shipment made by it to the same place on the same day in 1901, even though there had been no competition in the two sales and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It claimed that it was a mere matter of mathematics and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

"To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and imprisonment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary laws varied

with the character of the property, the circumstances of the shipment, and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.

“This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In *Knudsen v. Michigan Central R. R.*, 148 Fed. 968, it was said by the Circuit Court of Appeals for the Eighth Circuit that to ‘support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission.’ A similar principle was applied in *Meeker vs. Lehigh Valley R. R.*, 183 Fed. 548, and in *Central Coal Co. vs. Hartman*, III Fed. 96, where the suit was to recover damages caused by a violation of the Anti-trust Act.

“Another case, on facts quite like those here involved, is that of *Hoover vs. Pennsylvania R. R.*, 156 Pa. 220, where the statute, like the Commerce Act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of 20 cents per ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the court saying:—‘The amount of injury suffered is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the

difference in the rates charged. It might be or it might not be, but, in any event, it must be a subject of proof. * * * It does not appear that the plaintiffs sold their coal for any less than the current market price, except when they and the other dealers were engaged in a war of prices and sold far below cost in a struggle to capture the market.'

"In view of the express provisions of section 8 of the Act to Regulate Commerce, it was error to refuse to charge that 'to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers.'"

See also:

- Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447, 42 L. Ed. 231, holding that "before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury," and that penalties are not recoverable on mere possibilities."
Meeker vs. L. V. R. R. Co., 236 U. S. 412, 59 L. Ed.—
Mitchell Coal & Coke Co. vs. Penn. R. R. Co., 230 U. S. 247, 57 L. Ed. 1472.
Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S. 304, 57 L. Ed. 1474.

Compare:

- Galveston, Harrisburg & San Antonio R. Co. vs. Wallace, 223 U. S. 481, 56 L. Ed. 516, holding that damages resulting from the failure of the carrier to deliver goods is not traceable to a violation of the provisions of the Act to Regulate Commerce.
Atlantic Coast Ry. Co. vs. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167.

§ 3. Equity Jurisdiction Under the Act to Regulate Commerce.

The United States Courts have jurisdiction of a suit in equity to enforce compliance with the provisions of the Act to Regulate Commerce and to require carriers to comply with the terms of such Act by affording proper and

reasonable facilities for interchange of traffic and enjoining such carriers from refusing to receive for transportation over their lines carload shipments which might be tendered them, as a case arising under the constitution and laws of the United States.

Central Stock Yards Co. vs. L. & N. R. R. Co., 192 U. S. 568,
48 L. Ed. 565.
In re Lennon, 166 U. S. 548, 41 L. Ed. 1110.

The power of equity jurisdiction in cases brought on behalf of the Interstate Commerce Commission was expressly conferred by the Elkins Act.

Md. Pac. Ry. Co. vs. U. S., 189 U. S. 274, 47 L. Ed. 811.

§ 4. Effect of State Statutes of Limitation.

The Act to Regulate Commerce contains no limitation of time for the bringing of suits for the recovery of damages under the right of action conferred by section 8, except when action is brought, under the provisions of section 9, before the Commission, in which latter case a limitation of 2 years is imposed.

Act to Regulate Commerce (Amd. 1910), section 16.

Where actions are brought in the courts, under the sanction of section 8, the statute of limitations of the state in which the suit is instituted, governs.

Revised Stats. U. S., section 721.

See also:

Bank vs. Eldred, 130 U. S. 693, 32 L. Ed. 1080.
Ratican vs. Term. R. R. Assn., 114 Fed. Rep. 666.
Coop vs. L. & N. R. R. Co., 50 Fed. Rep. 164.
Murray vs. C. & N. W. R. Co., 92 Fed. Rep. 868.

See also:

M. K. & T. Ry. Co. vs. Harris, 234 U. S. 412, 58 L. Ed. 1377.
M. K. & T. Ry. Co. vs. Cade, 233 U. S. 642, 58 L. Ed. 1135.
Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186, 208,
55 L. Ed. 167.

§ 5. Assignment of Claims for Damages or Overcharges.

Inasmuch as claims for damages or overcharges under section 8 and section 9 constitute property rights, such claims may be assigned and the action for recovery maintained in the name of the assignee.

Edmunds vs. I. C. R. R. Co., 80 Fed. Rep. 78.

See also:

P. R. R. Co. vs. Internl. Coal Co., 173 Fed. Rep. 1, where this principle was sustained where sale of the original claimant's corporate property had intervened before recovery was sought.

§ 6. Reference Paragraph.

See also citations of cases in connection with amplification of section 9, **post**

Because of the interdependency of the provisions of sections 8 and 9 of the Act to Regulate Commerce, the subject of **Damages** will be dealt with in subsequent chapters commencing with Chap. IX, following the amplification of section 9, **post**.

CHAPTER VIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 9.

- § 1. Statutory Provisions.**
- § 2. Right of "Election of Tribunal" by Injured Person.**
- § 3. Jurisdiction and Equity Under the Act to Regulate Commerce.**

CHAPTER VIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 9.

§ 1. Statutory Provisions.

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of the Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Persons claiming to be damaged may elect whether to complain to the Commission or bring suit in a United States court.

Officers of defendant may be compelled to testify, but shall receive immunity.

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§ 2. Right of "Election of Tribunal" by Injured Person.

Section 2, while bearing its closest relationship to section 1, must be read in conjunction with the entire context of the Act. Like section 1, this section relates directly to the right of private persons to invoke legal remedies against violations of the Act to Regulate Commerce by common carriers subject thereto. It may not be accepted in any way as an independent piece of legislation but must be interpreted with a view to its interdependency with all other sections of the Act.

The section in terms gives to the person or persons claiming to be damaged or injured by the Act of any common carrier in violation of any of the provisions of the Act to Regulate Commerce a right of choice between proceeding for the recovery of his damages in a court of competent jurisdiction or before the Interstate Commerce Commission.

Prior to the important amendments to the Act in 1916 and 1918, there were substantially controlling reasons for proceeding in the recovery of damages arising out of violations of the provisions of the Act to Regulate Commerce either in the courts or before the Commission. If the complaint was made to the Commission in the first instance, that tribunal's procedure not being technical like the court's, a much wider range of evidence could be produced and given consideration by the Commission. Moreover, the Commission was in possession of technical and pertinent facts and information which could not be availed of under the strict rules of courts. However, if the defendant carrier should refuse or fail to comply with the Commission's order awarding damages, the recovering party was then under the necessity of applying to the

courts for enforcement of the Commissioner's order, in which latter proceedings the findings of the Commission became *prima facie* evidence of the claimant's right of recovery. In actions in the courts the losing party is required to pay the costs of the suit, whereas in proceedings before the Commission, no costs accrue. These conditions frequently gave rise to dissatisfaction because of the strategical machinations of the law sometimes resorted to by zealous practitioners.

The enlargement of the remedial powers of the Act to Regulate Commerce have, in many respects, modified the jurisdiction of the courts in proceedings brought under the provisions of both sections 8 and 9. The power of the courts to award damages to persons claiming injury under the provisions of the ninth section is confined to the rendering of a decree in redress of a particular injury, and is not a power sufficient to compel the carrier to desist from the commission of such wrong in the future. It therefore follows that any independent right of an individual to proceed in the courts for the recovery of pecuniary redress for violation of the Act to Regulate Commerce may be confined to the redress of such injury as the courts have the power to redress. Whatever action the court may take must be consistent with the entire content of the Act to Regulate Commerce. Hence, where recovery is sought because of an alleged unreasonable rate collected by the carrier, the Supreme Court has held that such action may not be maintained in the courts unless the Commission has first decided that the rate was unreasonable and fixed the extent of such unreasonableness. Nor is the provision of section 20 of the Act that the common law and statutory rights of the shipper are expressly preserved to him, sufficient to constitute a common law right or statutory

remedy which is inconsistent with the provisions of the Act to Regulate Commerce.

Hence, it is clear that the only suits which may be maintained in the courts for the redress of wrongs perpetrated against the provisions of the Act, are those suits in which the action of the court is consistent with the entire context of the Act, and which do not require previous action by the Commission before the redress can be decreed by the court.

The Act as now amended not only suspends the shipper's right to institute action for recovery of damages in all cases where the condition precedent to his right to proceed in the courts is the previous action of the Commission declaring the wrong and its extent, but supersedes it entirely. Thus, in an action for damages on account of alleged discrimination, such action cannot be maintained in the courts until the Commission has first determined if the act of the carrier complained of was unduly discriminatory within the provisions of the Act and fixed the extent of the discrimination.

This does not mean, however, that the converse of the rule is also untenable because an action may be maintained in the courts for the recovery of damages resulting from an unlawful discrimination in rates where the measure of such damages is the difference between the amount paid by the claimant and the amount paid by other shippers under substantially the same circumstances and conditions and during the same period of time. In such a case it may be properly said that there is no question to be submitted to the Commission and that the action is solely and completely determinable by the courts.

The decision of the Supreme Court in the **Abilene Cotton Oil Co. case** (204 U. S. 426, 51 L. Ed. 553) declared it

to be an established principle that the courts could not primarily interfere with or invade the administrative functions vested in the Commission, and that complaints which were primarily within the administrative competency of the Commission, clothed by statute with original authority, are not subject to be judicially enforced, at least, until the Commission has had a proper opportunity to "exert its administrative functions."

B. & O. R. R. Co. vs. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292.

When the Commission has acted and has declared a rate unreasonable or a discrimination unjust, action may be judicially undertaken under the provisions of section 16 of the Act, the parties having stipulated in the proceedings prosecuted under that section, that the court adjudge the amount of reparation.

So. Ry. vs. Tift, 206 U. S. 428, 51 L. Ed. 1124.
Macon Gro. Co. vs. A. C. L. R. Co., 215 U. S. 501, 51 L. Ed. 300.

Undoubtedly the best considered case in which the Supreme Court has had before it the fundamental functions of the Commission under the commerce statute was the **Abilene Cotton Oil Co. case**, *supra*. Action was brought in the state courts of Texas to recover from a carrier freight charges alleged to have been paid to it in excess of a just and reasonable rate, which rate was the one fixed in the tariffs which the carrier had published, filed, and posted in accordance with the requirements of the Act to Regulate Commerce. Addressing itself to the judicial question, the Supreme Court said:

"When the Act to Regulate Commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable,

the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. (*Parsons vs. Chicago and Northwestern Railway*, 167 U. S. 447, 455, 42 L. Ed. 231, 17 Sup. Ct. 887; *Interstate Commerce Commission vs. Baltimore and Ohio Railroad*, 145 U. S. 263, 275, 36 L. Ed. 699, 12 Sup. Ct. 844). That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, is it not open to controversy that to provide for these subjects was among the principal purposes of the Act. (*Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, 494, 42 L. Ed. 243, 17 Sup. Ct. 896.) And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. (*Cincinnati, New Orleans and Texas Pacific Railway Co. vs. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.)

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and

discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the Act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in the future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the Act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action

by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the Act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the Act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the Act impossible.

"Nor is there merit in the contention that section 9 of the Act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the Act and in the light of the considerations which

we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the Act; in other words, to command a correction of the established schedules which power, as we have shown, is conferred by the Act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the Act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the Act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the Act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

"And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower federal courts and in the construction which the Act has apparently received from the be-

ginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing with the questions here presented, yet necessarily concern the same. * * * When it is considered that the Act to Regulate Commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration, holding that a court could, compatibly with the terms of that Act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the Act had generally been treated in practical execution as incompatible with the existence of such power or right. And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the Act; that is to say, the necessary legal effect correcting established schedules.

"The cases of *Cincinnati, New Orleans and Texas Pacific Railway Co. vs. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Louisville and Nashville Railroad Co. vs. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209, and *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.*, 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687, involved the enforcement against carriers of orders of the Commission, after deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that

by the effect of the Act to Regulate Commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the Act to Regulate Commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule. * * *

"When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the Act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands. * * * Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to Regulate Commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it

is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the Act to Regulate Commerce."

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 442, 41 L. Ed. 553.

In *Mitchell Coal & Coke Co. vs. P. R. R. Co.*, 230 U. S., 247, 57 L. Ed. 1472, the coal company sued in the federal courts for damage suffered because of the payment of rebates to other coal companies in the same field. The published tariff named the rate from station to destination, but it was usually construed to include the haul from the mines within the district to the station and was so applied upon all the shipments made by the plaintiff and its competitors. The defendant had paid to complaint's competitors so-called trackage or lateral allowances as compensation for hauling cars from their mines to the station. Defendant sought to justify the allowance, contending that because of dissimilar conditions it could itself haul plaintiff's cars from the mines but could not do so economically for the other mine operators. The Supreme Court held that whether or not the allowance was proper was an administrative question for his Commission to pass upon, and that hence the action did not lie, and on page 255 of its opinion said:

"But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one legal quality of the practice complained of may be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have

not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a law suit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character, to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

On pages 256 and 257:

"It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality can not be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies section 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania R. R. vs. International Coal Co.* There the carrier insisted that a suit for damages, occasioned by rebating, could not be main-

tained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon reasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.”

In C. R. I. & P. Ry. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. Ed. 284 the Supreme Court referred to the coordination of sections 8, 9 and 10 of the Act to Regulate Commerce as follows:

“Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. Thus, by section 8, is it provided ‘That in case any common carrier subject to the provisions of this Act * * * shall omit to do any

act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further by section 9, an election is given either to make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by section 10 it is made a criminal offense for an employee of a corporation carrier to 'willfully omit or fail to do any act, matter, or thing in this Act required to be done.'"

In reviewing these expressions of judicial opinion the Commission in **Vulcan Coal & Mining Co. vs. I. C. R. R. Co.**, 33 I. C. C. Rep. 52, 63, said:

"Because of the importance of the subject, we have quoted at length the statements of the Supreme Court of the United States on the question of priority of jurisdiction as between the Commission and the courts. We will now consider their bearing upon defendant's contentions. A careful examination of the language used by the Supreme Court shows that it has nowhere declared that there can be no concurrent jurisdiction of the Commission and the courts. True, it has stated that section 9 must be read in the light of the remainder of the Act and can not be so interpreted as to defeat the purposes of the Act. For that reason it was held that certain questions may not be brought before the courts for adjudication without a prior determination by this Commission. The fallacy of defendant's reasoning becomes evident when we consider the reasons assigned by the court for not assuming original jurisdiction of administrative questions. In the Abilene case the court said that an interpretation of the Act which would allow a shipper

to obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury would 'destroy the prohibition against preference and discrimination;' and would 'make it impossible to maintain 'a uniform standard of rates.' In other words, an opposite holding would have accomplished the very thing which the Act to Regulate Commerce was intended to prevent. Can it be argued that if the Commission assumed jurisdiction in the present case the accomplishment of the objects and purposes of the Act would be endangered? It is obvious that such a contention can not be made. In the Mitchell case it is definitely stated that 'section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute.' The only exception made in any instance is that necessitated by the prior adjudication by the Commission of an administrative question.

"Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in *P. R. R. Co. vs. International Coal Co.*, *supra*. It may be that after the determination by the Commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the Commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty

to maintain a reasonably adequate car supply and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the Mitchell case, 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of this tribunal.

"It does not necessarily follow, however, that every case involving car supply must come first before this Commission. It is obvious that if a carrier should absolutely refuse to furnish a shipper cars under any circumstances that would be a violation requiring no administrative determination, and the courts could take primary jurisdiction. It would be analogous to the situation presented in *P. R. R. Co. vs. International Coal Co.*, *supra*, or *Danciger vs. Wells Fargo & Co.*, *supra*, and *L. & N. R. R. Co. vs. Cook Brg. Co.*, *supra*, to which defendant referred in its argument. In the latter case it was held to be unnecessary under the rule in the Abilene case for a shipper, who had been refused transportation of liquor into dry territory because of the alleged prohibition of a state statute, to go to the Commission before suing for a mandatory injunction to compel such service.

"A large number of the cases now before the courts involving the adequacy of carriers' car supply, and which defendant contends must be held to be improperly before the courts should the Commission have jurisdiction in the present case, are undoubtedly cases of the sort referred to in the preceding paragraph. So, also, cases involving the adequacy of car supply for intrastate shipments are obviously within the jurisdiction of state tribunals.

"The distinction between a case involving car supply of which this Commission has primary jurisdiction and a case which may be brought before the courts without a prior determination by the Commission is

clearly stated in *United States vs. L. & N. R. R. Co.*, 195 Fed. 88. In that case the United States Commerce Court was petitioned for a writ of mandamus commanding defendants to transport coal over the through routes and at the joint rates which had been established by them. It appears that there had been a controversy of long standing between defendants as to which carrier should furnish cars for loading at the mines of the petitioners. The court held:

'This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree.'

"Another decision of the Supreme Court of the United States which involves a question of car supply is *C., R. I. & P. Ry. Co. vs. Hardwick Farmers' Elevator Co.* 226 U. S. 426. In that case the court had under consideration the validity of a Minnesota statute which, among other things, undertook to penalize carriers in the sum of one dollar per car per day for failing to supply cars upon demand. The Supreme Court held that Congress had legislated upon the subject of furnishing cars and that state regulations, in so far as they applied to interstate shipments, must yield to the supreme power conferred upon Congress by the commerce clause of the federal constitution."

§ 3. Jurisdiction and Equity Under the Act to Regulate Commerce.

Where formerly the general jurisdiction of courts of equity for the protection of rights in interstate commerce, whether private or public, was complete, the 1910 amendment of the Act enlarged the powers of the Commission and vested in it the right to suspend and increase rates for a stated period for the purpose of investigating their reasonableness and propriety, thus giving to shippers the right to complain to the Commission and secure proper relief through that tribunal. If the Commission condemns an advance of rates as unreasonable the courts can, in a proper proceeding, enjoin the carriers from enforcing the advance, but the shippers are no longer dependent upon the courts for that form of relief. As stated in the amplification of section 8, *ante*, only those cases which involve the Act to Regulate Commerce and are not such as the law requires shall be submitted to the Commission, are within the judicial competency of the courts. Thus, in a case where the state of Kentucky had by statute made it unlawful for carriers to transport liquor into dry districts of that state, the carrier refused to accept interstate shipments of liquor destined to points in the state of Kentucky subject to the local option law. A suit in equity was instituted to compel the carrier to accept such shipments. The case was appealed to the Supreme Court of the United States and that court, in the course of its opinion, said:

“Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. * * * The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is inciden-

tally stated in the answer of the company, and this fact is now made the basis for an argument that neither the state court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce. Why should the brewing company have made complaint to the Commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body. The decision in the case of *Texas and Pacific Railway vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved

the very heart of the whole statute. That there might be uniformity in rate-making necessarily required a resort to that body as a basis for a common law recovery of an excessive charge.' ”

L. & N. R. R. Co. vs. Cook Brg. Co., 223 U. S. 70, 56 L. Ed. 355.

Stated in another sense, and as a general proposition, courts of equity have jurisdiction over all actions growing out of alleged violations of the provisions of the Act to Regulate Commerce wherein the Commission has no power to furnish relief in the premises.

N. Y. N. H. & H. R. R. Co. vs. I. C. C., 200 U. S. 361, 50 L. Ed. 515.

Meeker vs. L. V. R. R. Co., 236 U. S. 412, 59 L. Ed.—

Philips vs. G. T. W. Ry. Co., 236 U. S. 662, 59 L. Ed.—

T. & P. Ry. Co. vs. Amer. Tie & Lumber Co., 234 U. S. 138, 58 L. Ed. 1255.

P. R. R. vs. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446.

Baer Bros. Merc. Co. vs. D. & R. G. R. R. Co., 233 U. S. 479, 58 L. Ed. 1055.

I. C. C. vs. I. C. R. Co., 215 U. S. 452, 54 L. Ed. 280.

Webster Coal & Coke Co. vs. Cassett, 207 U. S. 181, 52 L. Ed. 160.

Sou. Ry. Co. vs. Tift, 206 U. S. 428, 51 L. Ed. 1124.

T. & P. Ry. Co. vs. Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562.

I. C. C. vs. L. & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047.

L. & N. R. Co. vs. Behlmer, 175 U. S. 648, 44 L. Ed. 309.

C. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184, 40 L. Ed. 935.

Counselman vs. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110.

CHAPTER IX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES ARISING OUT OF VIOLATIONS OF THE ACT TO REGULATE COMMERCE.

- § 1. Power of Interstate Commerce Commission to Award Damages.
- § 2. Awards of "Transportation" or "Rate" Damages.
- § 3. Persons Entitled to Damages.
- § 4. Effect of Statute of Limitation on Application for Reparation.

CHAPTER IX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES ARISING OUT OF VIOLATIONS OF THE ACT TO REGULATE COMMERCE. ..

§ 1. Power of Interstate Commerce Commission to Award Damages.

The authority of the Interstate Commerce Commission to award damages is necessarily confined to damages arising out of violations of the Act to Regulate Commerce. Until its report of March 11, 1912, in **Hillsdale Coal & Coke Co., et al., vs. Penn. R. R. Co.**, 23 I. C. C. Rep. 186, 188, the Commission had declined, following the ruling in **Joynes vs. P. R. R. Co.**, 17 I. C. C. Rep. 361, 362, to entertain jurisdiction of claims for damages for unlawful discriminations. But in the **Hillsdale Coal & Coke Co. case, supra**, the Commission awarded general damages resulting from unlawful discriminations in the distribution of coal car equipment, in order, as it there said, "to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases."

There was much conflict between the Commission's administrative interpretations of its authority to award such damages, it having held in two exhaustively consid-

ered opinions—in the first one that its authority in this respect empowered it to award general damages arising out of violations of the Act to Regulate Commerce, and in the second instance that its jurisdiction was confined to awards of transportation rate damages where the measure of damages is fixed and certain,—and the federal courts which had more recently held that the Commission alone is the only competent tribunal to entertain complaints for general damages arising out of violations of the Act to Regulate Commerce, such as unlawful discriminations in the practices and regulations of the carriers subject to the Act.

Jones vs. Penn. R. R. Co., 17 I. C. C. Rep. 361, 362.
Washer Grain Co. vs. Mo. Pac. Ry. Co., 15 I. C. C. Rep. 147, 151.
Moerisdale Coal Co. vs. P. R. R. Co., 163 Fed. Rep. 909.
Moerisdale Coal Co. vs. P. R. R. Co., 176 Fed. Rep. 748.

The propriety of the Commission's jurisdiction to award general damages for violations of the Act to Regulate Commerce is now settled by the courts, and the Commission has since heard evidence, determined the amount of damages, and entered award therefore in favor of the shippers. The difficulty in these cases no longer concerns the Commission's jurisdiction, but instead the question of proof.

In the International Coal Mining Case (230 U. S. 184, 57 L. Ed. 1446), where damages were claimed because the carrier had rebated part of the published rate to a competitive shipper, and where the complaining shipper contended that it was unnecessary to allege or prove that he had suffered any injury, in that as a matter of law he was entitled to recover as damages the same rate as had been rebated to his competitor, on all his tonnage at the same time over the same route, the Supreme Court of the United

States disposed of this contention in the following language. (Op. by Justice Lamar):—

"Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers. * * * The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate or many times greater than the rebate. But unless they were proved, they could not be recovered."

Thus, the rule must be that the shipper's rights are not measured by the benefits another shipper receives, but are measured by the actual damages he suffers, proof of which must therefore be made as in any other suit in the courts. And what must be shown to establish the fact and extent of damage is the present difficulty in cases where the Interstate Commerce Commission is called upon to exercise its now conceded authority to award general damages for violations of the Act.

The Commission well states the general rule in these cases thus:—

"Reparation may properly be awarded when a discriminatory rate has been exacted, but it does not necessarily follow that because a rate is found to be unjustly discriminatory and unduly prejudicial, that the complaining parties are the ones who have been damaged through its exaction. And to which the Supreme Court adds 'that it may be difficult to prove damages is no reason for denying the right thereto if the damages are reasonably certain and can be proved with reasonable exactitude.'"

The Commission is authorized and required by section 8 of the Act to Regulate Commerce to award the full amount of damages sustained and that, of course, is to be

determined from the evidence. If, for instance, it shows that the damage corresponds to the amount of the rebate, or to the extent of the overcharge, the injured party is entitled to an award upon that basis.

In the **Mills case** the Commission had found that the complaining shipper was entitled to a stated amount "as reparation." Before the Supreme Court the defendant carrier contended that this finding by the Commission was not equivalent to a finding that the shipper was damaged.

Disposing of this contention, the Supreme Court held:—

"What the Commission decided was that the shippers were entitled to reparation, that is to be made whole,—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid 'as reparation on the specified shipments was the amounts which they found necessary to accomplish the reparation—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was a damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

Mills vs. L. V. R. R. Co., 238 U. S. 473.

P. R. R. Co. vs. I. C. C., 193 Fed. Rep. 81.

Meeker vs. L. V. R. R. Co., 236 U. S. 412.

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S. 304.

Penn. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184.

Weinman vs. De Palma, 232 U. S. 571.

Robinson vs. B. & O. R. R. Co., 222 U. S. 506.

B. & O. R. R. Co. vs. U. S., 215 U. S. 481.

- L. V. R. R. Co. vs. American Hay Co., 219 Fed. Rep. 539.
Darnell-Taenzer Lumber Co. vs. So. Pac. Co., 221 Fed. Rep. 890.
So. Pac. Co. vs. Goldfield Consolidated Milling & Transportation Co., 220 Fed. Rep. 14.
Meeker vs. L. V. R. R. Co., 211 Fed. Rep. 785.
Morrisdale Coal Co. vs. P. R. R. Co., 183 Fed. Rep. 929.
Morrisdale Coal Co. vs. P. R. R. Co., 176 Fed. Rep. 748.
Curry & Whyte Co. vs. Duluth & I. R. R. Co., 30 I. C. C. Rep. 1, 14.
New Orleans Bd. of Trade vs. Illinois Central R. R. Co., 29 I. C. C. Rep. 32.
Becker vs. Pere Marquette Ry. Co., 28 I. C. C. Rep. 645, 657.
Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 23 I. C. C. Rep. 186.
New Orleans Board of Trade vs. Illinois Central R. R. Co., 23 I. C. C. Rep. 465.
Bulah Coal Co. vs. Penn. R. R. Co., 20 I. C. C. Rep. 52.
Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 19 I. C. C. Rep. 356.
Clark Brothers Coal Mining Co. vs. Penn. R. R. Co., 19 I. C. C. Rep. 392.
Naylor vs. L. V. R. R. Co., 18 I. C. C. Rep. 624.
Naylor vs. L. V. R. R. Co., 15 I. C. C. Rep. 9.
Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 229 Pa. 61, 78 Atl. Rep. 28.

In the recent case of Pennsylvania R. R. Co., vs. Clark Brothers Coal Mining Co., No. 290—October Term, 1914, 238 U. S. 456, Justice Hughes, delivering the opinion of the Supreme Court, reviewed exhaustively the effect of the Interstate Commerce Commission reparation order limiting damages in a car distribution case.

The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon.

- I. C. C. vs. I. C. R. R. Co., 215 U. S. 452.
I. C. C. vs. C. & A. R. R. Co., 215 U. S. 479.
Penn. R. R. Co. vs. Puritan Coal Co., 237 U. S. 121, 131.
Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304, 313.

Further, by reason of the nature of the question involved in an attack upon the rule or method of the com-

pany in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule.

Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S. 121, 131.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304, 313.

U. S. vs. Pacific & A. R. & Nav. Co., 228 U. S. 87, 107.

Robinson vs. B. & O. R. R. Co., 222 U. S. 506, 511.

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 441, 448.

The Commission also had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint. The Court deemed the provisions of the Act to be clear upon this point. See sections 8, 9, 13, 16. There is nothing in the Act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of section 3, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the Act, and their ascertainment is within the scope of the Commission's authority.

Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S. 121.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304.

Mitchell Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 247, 257.

I. C. C. vs. I. C. R. R. Co., 215 U. S. 452.

Where it appears that the Act has been violated, and the requisite ruling as to the unreasonableness of the practice

assailed has been made by the Commission, the provisions of section 9 are applicable. This section provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

In *Pennsylvania Railroad Co. vs. Puritan Coal Co.*, supra, concerning section 9, the court said:

"It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the federal courts. The express grant of the right of choice between these two remedies was the exclusion of any other remedy in a state court.

"In *Mitchell Co. vs. Pennsylvania Railroad Co.*, 230 U. S. 250, the same view of the statute was taken in discussing another, but related question. "This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on reparation orders to be brought in the federal court of the district where the plaintiff resided or the company had its principal office, and while the Act of 1910 (36 Stat. 554), in further aid to shippers, permitted suits on reparation orders to be brought in state or federal courts, it made no change in sections 8 and 9, which as shown above, gave the shipper the option to make

complaints to the Commission or to bring suit in a United States Court. Referring to the proviso in section 22, with respect to the preservation of existing remedies, it was then pointed out that the proviso was not intended to nullify other parts of the Act, but to maintain existing rights which were not inconsistent with those which the statute created. And, finally, with regard to a case such as the present one, where the Commission at the instance of the injured party has made its ruling as to the unreasonableness or unjustly discriminatory character of the practice attacked, the court thus defined the remedy available: 'Until that body (the Commission) has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commissions or in the United States courts of competent jurisdiction, as provided in section 9.' "

In the **International Coal Mining case**, *supra*, it was said that the action was brought to recover damages caused by the violation of or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it was urged, was held in the **Puritan case**. See also **Illinois Central R. R. Co. vs. Mulberry Hill Coal Co.**, 238 U. S. 275. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In the **International Coal Mining Case**, the plaintiff had done so. He went before the Commission, with his complaint under the Act, assailing the rule of the company, and he secured from the Commission a finding as to the illegality of the rule and the violation of the Act. This proceeding established the character of the claim so far as interstate trans-

actions were concerned, and it could be prosecuted solely under the federal statute. This follows necessarily from the supremacy of the federal legislation in relation to interstate commerce. So long as the creative provisions of the federal act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail himself of common-law remedies or of those afforded by local statutes. But when as a result of his own insistence upon his federal right under the Act, it appeared that the Act had been violated and that the special remedial provisions of the Act were applicable, it was not possible for the plaintiff to ignore the statute he had thus called into play and disregard its provisions for the purpose of measuring his relief by a local standard. The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages he was entitled to recover with respect to interstate sales in the state court.

This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in section 16 of the Act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceedings before the Commission was pending and the plaintiff's right and remedy were fixed by the federal act.

The court concluded therefore, that with respect to the

damage sustained by the plaintiff in its interstate business by reason of the unjustly discriminatory distribution of cars for interstate shipments, the plaintiff was not entitled to maintain this action under the state statute. The judgment was reversed and the cause remanded for further proceedings not inconsistent with the court's holding.

§ 2. Awards of "Transportation" or "Rate" Damages.

The authority vested in the Interstate Commerce Commission to determine and award transportation or rate damages is conferred upon that body by the same statutory power from which the courts have held it derives its jurisdiction over general damage claims resulting from violations of the Act. Sections 8, 9, 14, 15 and 16, read conjointly, invest the Commission with authority to award damages for the acts or omissions of the carriers which contravene the provisions of the Act. It is the general mandate of the statute that the rates and charges must be "just and reasonable," and for violation of this requirement the Commission is empowered to award damages.

If a rate is "unjust or unreasonable" the Commission is empowered to investigate such rate, hold a hearing, determine a "just and reasonable" rate in lieu thereof for the future, and award damages to the shippers by way of reparation, which damages are measured by the amount paid in excess of rates found to be reasonable.

Confining the context now to the power and authority of the Commission to award damages with respect to rates and practices affecting rates, or, as the Commission terms it, transportation or rate damages, it is of interest to turn to those cases in which the Commission has administratively interpreted the provisions of the Act conferring

upon it jurisdiction and power to enter orders or reparation in rate cases.

In *Southern Pine Lumber Company vs. Southern Railway Company*, 14 I. C. C. Rep. 195, 197 (1908), the Commission said:—

“Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort. Bouvier defines ‘reparation’ as ‘Damages for an injury; amends for a tort.’ If an injury is sustained on account of a violation of law, the proceeding is in its nature *ex delicto*, and therefore carries with it none of the features or incidents of action *ex contractu*. In the very nature of the thing no protest is necessary where an injury is inflicted by the commission of a tort. The violation of the law produces the injury and completes the offense, and the person injured does not have to perform any conditions to entitle him to recover for the damage sustained.

“Again, neither the carrier nor shipper can lawfully depart from the published rate. Both are charged with notice of what it is, and are punishable for deviating therefrom. It would be vain to protest. The amount of the rate is fixed in the established schedule, and a penalty is imposed for charging or receiving a greater or less different compensation for such transportation of passengers or property.’ The law looks to the substance of things and does not require useless forms or ceremonies.

“Whatever may have been the rule at common law, the Act to Regulate Commerce prescribes the duty of both the carrier and shipper, and it seems to us that—‘the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the arrangement had been made, both the carrier and the shipper would have been guilty of criminal offense and the agreement

would have been absolutely void as to be impossible of enforcement.' **Texas & Pacific Ry. vs. Abilene Cotton Oil Co.**, 204 U. S. 445.

"Moreover, in view of the necessary relations between the carrier and shipper, the dependence in modern business life of the latter upon the former, the right and duty of the carrier in the first instance to fix its charges, its obligation to adhere to the same until altered in the manner prescribed by law, and its right to enforce such charges by retaining possession of the freight transported or to demand payment of the freight charges as a prerequisite to the transportation, the parties are not upon an equal footing—a condition, even at common law, necessary to sustain the requirements of a protest and to negative the idea of voluntary payments. It is also manifest that to sustain this contention would be to open the way to the grossest discriminations, to prevent which is one of the leading purposes of the Act to Regulate Commerce.

"We have already held that protest by the shipper or consignee against the payment of the lawfully established freight rate is not a necessary prerequisite to the recovery of damage resulting from an unreasonable charge, and we adhere to this conclusion. **Baer Bros vs. Mo. Pac. Ry. Co.**, 13 I. C. C. Rep. 329.

Again, in **Blume & Co. vs. Wells, Fargo & Co.**, 15 I. C. C. Rep. 53, 54, the Commission gave further utterance to its conception of its authority to award reparation when it held:—

"The purpose of the Act, as it fully revealed in its first five sections, was to secure just and reasonable rates; to prohibit unjust and discriminatory rates in the performance by carriers of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences; to forbid a higher charge for a shorter than for a longer haul in the

same direction, the shorter being contained within the longer haul; and to render unlawful all combinations among carriers for the pooling of freights. In a word, as a regulative measure, the Act confers upon the Commission power and authority to enter orders only with respect to the rates and practices of carriers, and that this was its general object appears no less clearly from an analysis of the statute itself, than from the public discussion which accompanied its enactment. It was intended by the Congress that the Commission should supplant and take the place of the courts with respect to that large class of complaints that may arise out of the failure of carriers to carry out their contracts of transportation promptly and safely, and properly to perform their duties as common carriers from one point to another. As to all such claims, as we have had occasion frequently to say in connection with informal complaints of this character, the Commission is without authority to afford redress.

"It is true that the Act authorizes the Commission, after full hearing and upon complaint made, to award damages, but it is careful to restrict that authority to cases in which the carrier may be liable under the provisions of the Act. The express language of section 8 is that in case of the commission or omission by the carrier of any matter or thing prohibited or required by the Act, 'such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act.' In section 9 the provision is that the person injured 'may bring suit * * * for the recovery of the damages for which such common carrier may be liable under the provisions of that Act.' In section 16 the Commission is authorized to make an award of damages whenever, after hearing and upon complaint made, it shall find that the party complainant 'is entitled to an award of

damages under the provisions of this Act for a violation thereof. It is a violation of the provisions of the Act for a common carrier to demand and collect an unlawful or discriminatory rate, and of complaints based on such violations the Commission has full jurisdiction and may afford redress by establishing reasonable rates to govern future shipments and awarding reparation with respect to past shipments. The Commission may also require carriers to desist from unlawful preferences and otherwise regulate rates and practices of carriers; but with respect to the performance by carriers for the shipping public of their general duties as common carriers other than those covered by the Act, the Commission is wholly without authority. Breaches of duty in that respect, such as the loss of, or damage to property in transit, the failure to make delivery safely and with reasonable despatch in accordance with the contract, express or implied, which a carrier enters into when accepting a shipment for carriage, are matters that are solely within the jurisdiction of the courts. The complaint here is of such a character. The damage alleged to have been sustained by the complainants did not arise out of the breach of any duty or obligation resting upon the defendant under the terms of the Act to Regulate Commerce, but out of the breach of a duty imposed upon it, by the common law promptly to deliver at a designated point a shipment which it had accepted and agreed to deliver at that point. The only recourse that shippers have with respect to such claims for damages is 'in the courts.'"

This ruling was followed in *Carstens Packing Company vs. Oregon Railroad & Navigation Company, et al.*, 17 I. C. C. Rep. 125.

In the *Anadarko Cotton Oil Co.* case the Interstate Commerce Commission state the controlling principles followed by it in rate reparation cases.

An award of the Commission in reparation of damages resulting from a violation of the Act to Regulate Commerce is not enforceable as such, but in a suit in court for such damages the findings and order of the Commission are *prima facie* evidence in support thereof. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another.

The standard of the law by which the validity of any rate as affected by its amount is determined, is not more definite than it must be reasonable and just. The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. In the nature of the case there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration.

The law imposes upon the carriers the duty of initiating their rates, under the injunction of the statute that they shall be reasonable and just. In the performance of this duty by the carriers they must exercise judgment and discretion by a like resort to existing facts and circumstances and conditions in the first instance, just as the Commission must later do when the rates are brought in question before it. The carriers are presumed to act in good faith in their exercise of discretion and judgment under this somewhat indefinite standard of the statute in its practical application, and therefore rates established by the carriers can not be condemned except upon investigation and full hearing. A rate reasonable in view of the

circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable.

When a rate is advanced and the increased rate is condemned by the amount of the advance, a much more satisfactory basis for an award of reparation is afforded than in a case where so far as changes have occurred they have been, at least for the most part, reductions in a territory where changes in conditions have taken place which contribute in greater or less degree to a present showing of unreasonableness in existing rates. Again in many instances that rates have long remained in the tariffs, sometimes without frequent occasion on the part of shippers to use them and when traffic has been offered to which they were applied they have not only been challenged by the shipper as unreasonable, but conceded to be so by the carriers and clearly so found by the Commission by comparison with other rates and by other suitable tests, and orders for reparation have followed.

The reference to particular circumstances and conditions in the classes of cases just mentioned is not an intimation that awards of reparation are to be confined to such cases. It is intended only to make clearer our view that whatever may be the nature of the facts, circumstances, and conditions appearing in a particular case where reparation is involved, whether on account of excessive rates or by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed neces-

sary under the well-established principles of law as a basis for a judgment in court.

Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 49.

Thus, it may be seen that in rate reparation matters the Commission is confronted not alone with simply a mathematical measure of damages, but with consideration of all the facts and circumstances affecting both the quality of the rate condemned and the right of reparation. These reparation cases may be divided into groups—(1) those cases in which a rate is advanced and the increased rate is condemned, the shipper having a legal right to buy his transportation service at a reasonable rate, and therefore, entitled to an award of damages by reparation measured by the amount paid in excess of the rate found by the Commission to be reasonable, and (2) those controversies where a rate already in existence is attacked by the shipper as being unreasonable and declared by the Commission to be unreasonable as of the date of the latter's order. In this second group of cases, the question of when did the rate become unreasonable is a condition precedent to the shipper's recovery of reparation on the past shipments. And in the *Anadarko Cotton Oil Co., Case, supra*, the Commission declared that "it is manifestly impractical for the carriers, or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable." And the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money. The test of unreasonableness can be applied only by reference to and

upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. And so it remains in all such cases for the Commission to determine the fact when the rate became unreasonable, not overstepping of course the barrier against claims of this nature interposed by the two-year statute of limitations. For the statute to authorize the administrative tribunal to proceed otherwise in this class of reparation cases, would be to hold that the publication of rates is conclusive of their reasonableness, which would go far toward defeating one of the principal purposes of the regulatory legislation.

The court has declared that the Commission has no right to demand of the shipper, as a prerequisite to an order of reparation, "conclusive proof" of the unreasonableness of the rate in the past, a preponderance of the credible evidence being sufficient.

Thompson Lumber Co. vs. I. C. C., 193 Fed. Rep. 682, 683.

The Commission sometimes declines to award reparation on a shipment notwithstanding its holding that the rate or charge has been declared by it to be unreasonable or unduly discriminatory. For the mere fact that the Commission condemns a rate as unreasonable and prescribes a reasonable rate for the future, does not, in effect, automatically award reparation covering the statutory period of two years prior to the date the complaint was filed.

The question has been raised in numerous cases whether the Commission is authorized by the law to deny reparation in a case where it is found that the rate charged the complaining shipper was unreasonable or unjustly discriminatory, or whether the granting of reparation is a judicial act based upon a rule of law and not subject to

the exercise of discretion of the part of the Commission.

By section 8 of the Act to Regulate Commerce the Interstate Commerce Commission is authorized and required to find and award the full amount of damages sustained, and that, of course, must be determined from the evidence. If the evidence before the Commission shows that the damages corresponded to the rebate in one instance, says the Supreme Court in the *International Coal Mining Co. case*, *supra*, and to the overcharge in the other, the claimant is entitled to an award upon that basis. Nor is the fact that it may be difficult to prove damages any reason for denying the right thereto if the damages are reasonably certain and can be proved with reasonable exactitude.

It is obvious, from a study of the administration of the law and its judicial interpretation, that in giving the Interstate Commerce Commission jurisdiction over reparation and awards of damages arising out of violations of the Act to Regulate Commerce, it was the manifest intent of Congress not to deal in mere expressions in the statute, but to provide shippers with a method of obtaining an award of damages accruing by virtue of the violation of the Act, without resorting to the expensive and tedious process of the law.

To accomplish this desired result the Commission is, of necessity empowered to determine from the evidence before it, (1) whether or not the act of the carrier has done injury to the complaining party or to any other party by virtue of a violation of the provisions of the Act, and (2), if injury has been suffered, to determine the pecuniary value of such damage. This the Commission can only accomplish from a consideration of all the pertinent facts and circumstances attendant upon the transaction in which the injury was perpetrated. As the Commission said, in the

Curry & White Co. case—"Reparation may properly be awarded when a discriminatory freight rate has been exacted, but it does not necessarily follow that because a rate is found to be unjustly discriminatory and unduly prejudicial, that the complaining parties are the ones who have been damaged through its exaction."

Curry & Whyte Co. vs. D. & I. R. R. Co., 30 I. C. C. Rep. 1.

It is, therefore, the duty of the Commission to determine, from all of the facts and circumstances in the case, what the pecuniary damage of the shipper amounts and then to make its award of damages upon that basis.

This phase of the statute and the Commission's administration thereof is illustrated by the action of the Commission in the **Burnham-Hanna-Munger case**. In this case no reparation was awarded for shipments moving prior to the date of the order. On shipments moving after the date of the order and during the time the injunction against the order was in force awards of reparation were made. Two years after the order was made some of the rates were advanced to a point where they were held to be unreasonable, but the Commission in passing upon these increases, declared that its action was the prescribing of a new rate adjustment and reparation was denied.

Burnham, Hanna, Munger Dry Goods Co. vs. C. R. I. & P. Ry. Co., 14 I. C. C. Rep. 299. (See also 218 U. S. 88.)

In summary, the general rule is that the Commission is without authority under the law to award damages accruing by virtue of a violation of the Act to Regulate Commerce except upon the findings of fact, and these findings must be based upon evidence, both positive and definite. In other words, the Commission, in reparation cases, must have before it such clear and definite information and ab-

solute evidence of damages to the complaining party as will justify an order for the payment of a definite sum of money as reparation in such party's favor.

- Enns Milling Co. vs. C. R. I. & P. Ry. Co., 34 I. C. C. Rep. 197, 201.
 Griffing vs. C. & N. W. Ry. Co., 32 I. C. C. Rep. 283, 286.
 Stone & Son vs. Sou. Ry. Co., 29 I. C. C. Rep. 69, 701.
 Hampton Mfg. Co. vs. Old Dominion S. S. Co., 27 I. C. C. Rep. 666, 668.
 Commercial Club of Omaha vs. A. & S. Ry. Co., 27 I. C. C. Rep. 302, 314.
 Re Wool, Hides and Pelts, 25 I. C. C. Rep. 675, 678.
 National Wool Growers' Assn. vs. Oregon S. L. R. R. Co., 23 I. C. C. Rep. 151.
 Re Advance in Rates Between Mississippi and Missouri Rivers, 21 I. C. C. Rep. 546.
 Wheeler Lumber B. & S. Co. vs. Astoria & C. Ry. Co., 20 I. C. C. Rep. 10.
 Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43.
 Memphis Freight Bureau vs. K. C. S. Ry., 17 I. C. C. Rep. 90.
 Lansing-Harris Coal & Grain Co. vs. St. Louis & S. F. R. R. Co., 15 I. C. C. Rep. 37, 39.
 Burnham-Hanna-Munger Dry Goods Co. vs. C. R. I. & P. Ry. Co., 14 I. C. C. Rep. 299. (See 218 U. S. 88, reversing 171 Fed. Rep. 680.)
 Nicola, Stone & Myers Co. vs. L. & N. R. R. Co., 14 I. C. C. Rep. 199.
 Central Yellow Pine Assn. vs. I. C. R. R. Co., 10 I. C. C. Rep. 505.
 Tift vs. So. Ry. Co., 10 I. C. C. Rep. 548.
 Baer Bros. Merc. Co. vs. D. & R. G. Ry. Co., 233 U. S. 479.
 Pennsylvania R. R. Co. vs. International Coal Mining Co., 230 U. S. 184.
 I. C. R. R. Co. vs. I. C. C., 206 U. S. 441.
 So. Ry. Co. vs. Tift, 206 U. S. 428.
 Russe & Burgess vs. I. C. C., 193 Fed. Rep. 678.
 C. B. & Q. Ry. Co. vs. Feintuch, 191 Fed. Rep. 482.
 Denver & R. G. R. Co. vs. Baer Bros. Merc. Co., 187 Fed. Rep. 485.
 C. R. I. & P. Ry. Co. vs. I. C. C. 171 Fed. Rep. 680.
 So. Ry. vs. Tift, 148 Fed. Rep. 1021.
 Tift vs. So. Ry. Co., 138 Fed. Rep. 753.

See also:

References to Statute:—

- Sec. 8 Act to Regulate Commerce.
 Sec. 9 Act to Regulate Commerce.
 Sec. 13 Act to Regulate Commerce.
 Sec. 14 Act to Regulate Commerce.
 Sec. 15 Act to Regulate Commerce.
 Sec. 16 Act to Regulate Commerce.

§ 3. Persons Entitled to Damages.

The Commission is confined in making awards of reparation for damages or injury sustained, to the real party who has sustained the damage in the transaction in which the illegal charges have been exacted. The reparation is due only to the person who has paid the illegal and excessive charges. It is the rule of the Commission, therefore, that in the making of orders of reparation upon proper proof of shipments, to make such orders in favor of (1) the party who paid the charges as freight charges, or (2) on whose account such charges were paid and who was the real owner of the property transported during the period of transportation.

The reason for this course of action was explained in one of the transcontinental cases, where the Commission in answer to the carriers' denial that the complainants were entitled to reparation, even though they conceded the rate was properly declared unreasonable by the Commission, said:

"Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and

they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported.

Burgess vs. Transcontinental Freight Bureau, 13 I. C. C. Rep. 668, 679, 680.

See also:

Lamb, McGregor & Co. vs. C. & N. W. Ry. Co., 22 I. C. C. Rep. 346.

Nicola, Stone & Myers Co. vs. L. & N. R. R. Co., 14 I. C. C. Rep. 199, 209.

This procedure in administering the reparation provisions of the Act to Regulate Commerce is in accord with the evident intent of the Act which authorizes the Commission to award reparation to any person or persons found to be damaged by any common carrier subject to the Act by violation thereof, and as not in conflict with the provision that a person not directly damaged is not precluded from invoking the authority of the Commission on his complaint against any alleged violations of the Act.

Laning-Harris Coal & Grain Co. vs. St. L. & S. F. R. R. Co., 15 I. C. C. Rep. 37, 39.

Such procedure, of course, applies to reparation awarded where the rate is unreasonable rather than to damages assessed for unlawful discrimination.

Since the amendment of the Act to Regulate Commerce in 1906, many shippers, associations, traffic bureaus, and private traffic consulting offices have been established throughout the country, and it is the practice and purpose of these institutions to directly represent shippers in their applications to the Interstate Commerce Commission for various forms of relief. While it is the policy of the Com-

mission to entertain complaints filed on behalf of shippers by such traffic or credit bureaus, in all such cases where reparation is awarded, the order will require payment to be made by the carriers either to the consignor or the consignee, as their interest may appear.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 246.

§4. Effect of Statute of Limitation on Application for Reparation.

Section 16 of the Act to Regulate Commerce requires that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after."

Act to Regulate Commerce
(Amd. 1910) section 16, paragraph 20.

In these cases, seeking recovery of damages for unreasonable or unduly discriminatory rates, the cause of action accrues when the payment is made, that is, the date on which the freight charges are actually paid or the complainant becomes legally liable for the freight. In other complaints for recovery of damages for alleged violations of the Act to Regulate Commerce over which the Commission exercises jurisdiction, the cause of action accrues when the carrier does the unlawful act or fails to do what the law requires.

Nor will the Commission take jurisdiction of or recognize its jurisdiction over any claim for reparation or damages which is barred by the statute of limitation, as above interpreted, and the Commission will not recognize the

right of a carrier to waive the limitation provisions of the Act to Regulate Commerce.

The statutory period of two years within which the Commission has jurisdiction to award damages arising from violations of the Act to Regulate Commerce runs from the time when a shipment is delivered and when it becomes the legal duty of the carrier to collect its lawful charges.

The provision of the Act that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," has been construed by the Commission in a proceeding bearing the title, **When a Cause of Action accrues under the Act to Regulate Commerce,**" 15 I. C. C. Rep. 201.

Where the question is whether the Commission may award damages for the imposition of an excessive rate when such rate was imposed more than two years prior to complaint being made before the Commission, in a case where it appeared that the full rate was not collected until January 6th, 1909, thereby saving the claim as against the statute of limitations, if the cause of action did not accrue until the date of payment, although the shipments moved in January and April of 1906, and within two weeks after their delivery demand was made upon the complainant for the tariff charges which the carrier had the right to exact, whether reasonable or otherwise, because they were the charges recognized by the law as the only charges which the carrier could impose without being subject to the penalties provided in the Act for accepting a less rate than that published in its schedules, damages could only be awarded as of the date the cause of action accrued.

A carrier may not demand or collect a greater or less

or different compensation for the transportation of passengers or property than the rates specified in the tariff filed and in effect at the time of the movement (section 6); and under the Elkins Act (section 1) not only is it provided that the carriers shall strictly observe their tariffs, but that it shall be unlawful for any person or corporation to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the Act to Regulate Commerce. Here, then, is a statutory duty imposed upon the carrier to charge, and upon the shipper to pay, the rate fixed in the tariffs, and deviation from this rule subjects both carrier and shipper to fine or imprisonment. While it is the common law rule that a cause of action does not accrue until actual payment has been made, so that there may be a basis in law for recovery, this rule is necessarily modified as to carriers subjected thereto by the provisions of the Act to Regulate Commerce. There can be no waiver on the part of a common carrier of its right to collect its tariff rates. It must upon the delivery of a shipment, exact whatever rate its schedules necessitate or it is guilty under the law of granting a concession effecting a discrimination. Unless this position is taken by the Commission and such construction of the Act given, there can be no such thing as a rebate so long as a running account is maintained between the shipper and the railroad.

Moreover, the position of the shipper was that the carrier by its own act may extend the statute of limitations indefinitely, so that on a shipment which moved today it need not collect the rate until the year of 1920, keeping it in suspense, and at any time during the interval defending itself against attack of court for granting a rebate,

upon the ground that a rate, or a portion thereof, was in dispute as between the shipper and the carrier, or that it had not chosen for its own purpose to make the collection which the law commands. The provisions of the law are entirely incapable of enforcement, unless the ground is firmly taken that from the time of the delivery of the shipment the obligation rests upon the carrier to make collection and upon the shipper to pay the rate. Reading the entire Act together no other conclusion than this can be arrived at, and the general principles of law governing contracts must be regarded as by implication revoked as to interstate carriers under the mandatory requirements of the Act.

The theory of the common law permitted carriers to make private contracts for transportation, which contracts were evidenced by the bills of lading given the shippers. Under this practice, charges varied as between shippers, and the fullest freedom was exercised to "trade" in transportation. The abuses arising under such conditions led to the enactment of the Act to Regulate Commerce. The bill of lading became at once little more than a receipt for the goods to be transported, into which could be legally incorporated nothing obnoxious to the law. It was therefore placed beyond the power of the agents of a corporation carrier, or of any other officer thereof, to bind the carrier to any rate other than that applicable, under the filed tariffs, to the traffic accepted for transportation. This is necessarily so, else the purpose of the law could be set aside at will by any agent who might choose to favor or to injure a shipper. The shipper obtains transportation by right of law, and the rate charged is not the result of contract, but is fixed and determined under a required legal form.

In support of this view the decisions are imperative that every carrier, subject to the Act to Regulate Commerce, must charge the rate shown in its published tariffs, even though (1) a different rate be shown on the bill of lading, or (2) a different rate be quoted to the shipper by the agent of the railroad, or (3) a different rate be agreed to by both carrier and shipper in a written contract, or (4) a different rate be declared by the courts to be a reasonable rate.

Blinn Lumber Co. vs. S. P. Co., 18 I. C. C. Rep. 430, 431.

Overlooking a higher through rate, charges were collected on the sum of the intermediate rates. After two years had expired the through rate was reduced to that basis and still later the balance of the through rate legally in effect on the date of the shipment was collected. Upon presentation of the claim some months later, the Commission held that it was barred by the statute, and that the case is controlled by Blinn Lumber Co. vs. S. P. Co., 18 I. C. C. Rep. 430.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 307.

Claims filed with the Commission since August 28th, 1907, must have accrued within two years prior to the date when they are filed, otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years' limitation in the act.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 10.

It is also held that a complaint filed by an association demanding reparation under general averments, but not naming the members of the association on whose behalf it is filed, nor setting up with reasonable particularity specific description of the shipments involved in the com-

plaint, does not operate to stop the running of the statute of limitations.

Missouri & Kansas Shippers' Assn. vs. A. T. & S. F. Ry. Co.,
13 I. C. C. Rep. 411.

However, when an individual or firm files a complaint for reparation on his or its own behalf, an informal complaint operates to stop the running of the period of limitation fixed by the Act.

The courts have held that the cause of action accrues when the shipment terminates and the shipper or owner becomes liable for the freight, and not when the money is actually paid.

Michigan Hardwood Mfrs. Assn. vs. Transcontinental Freight Bureau, 27 I. C. C. Rep. 32, 37.

St. Louis Blast Furnace Co. vs. L. & N. R. R. Co., 26 I. C. C. Rep. 355, 356.

Meeker & Co. vs. L. V. R. R. Co., 23 I. C. C. Rep. 480, 482.

Fels & Co. vs. P. R. R. Co., 23 I. C. C. Rep. 483.

Switzer Lumber Co. vs. A. & M. R. R. Co., 22 I. C. C. Rep. 471, 475.

Fisk & Sons vs. B. & M. R. R. Co., 19 I. C. C. Rep. 299, 300.

Shoecraft & Son vs. I. C. R. R. Co., 19 I. C. C. Rep. 492.

Acme Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 18 I. C. C. Rep. 376.

National Refining Co. vs. A. T. & S. F. Ry. Co., 18 I. C. C. Rep. 389, 390.

Blodgett Milling Co. vs. C. I. & S. R. R. Co., 18 I. C. C. Rep. 439.

Werner Saw Mill Co. vs. Erie R. R. Co., 17 I. C. C. Rep. 508, 510.

Venus vs. St. L. I. M. & S. Ry. Co., 15 I. C. C. Rep. 136, 137.

Woodward & D. vs. L. & N. R. R. Co., 15 I. C. C. Rep. 170.

Beekman Lumber Co. vs. St. L. I. M. & S. Ry. Co., 15 I. C. C. Rep. 274, 276.

Hartman Furniture & Carpet Co. vs. Wis. Central Ry. Co., 15 I. C. C. Rep. 530, 531.

Duluth Log Co. vs. M. & I. Ry. Co., 15 I. C. C. Rep. 627.

Pilant vs. A. T. & S. F. Ry. Co., 15 I. C. C. Rep. 178, 181.

Kile & Morgan Co. vs. Deepwater Ry. Co., 15 I. C. C. Rep. 235, 236, 237.

Nicola, Stone & Myers Co. vs. L. & N. R. R. Co., 14 I. C. C. Rep. 199, 206.

Meeker vs. L. V. R. R. Co., 236 U. S. 412.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304.

Arkansas Fertilizer Co. vs. U. S., 193 Fed. Rep. 667.

Louisville & N. R. R. Co. vs. Dickerson, 191 Fed. Rep. 705.

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See also:

- Alleged Unreasonable Rates on Meats, 28 I. C. C. Rep. 332, 335.
- Arkansas Fertilizer Co. vs. St. L. I. M. & S. Ry. Co., 25 I. C. C. Rep. 266.
- Riverside Mills vs. Ga. R. R. Co., 20 I. C. C. Rep. 423, 424.
- Jacoby vs. Penn. R. R. Co., 19 I. C. C. Rep. 392.
- Memphis Freight Bureau vs. C. T. R. R. Co., 21 I. C. C. Rep. 460, 461.
- Standard Oil Co. vs. Jacoby, 239 U. S. I. C. C. Unrep. Ops. 40, 49, 51, 94, 351, 359, 442, 449, 464, 517, 525, 543.

The amendment to section 16 fixing the limitation for bringing of reparation complaints before the Commission became effective August 28, 1906, and prior to that time there was no limitation in the statute. The laws of the state in which the suit was brought then controlled so far as any limitation of action was concerned. But it must be understood that this statute of limitations contained in section 16 of the Act to Regulate Commerce does not apply to suits brought primarily in a federal court.

- Kile & Morgan Co. vs. Deepwater Ry. Co., 15 I. C. C. Rep. 235.
- Re When a Cause of Action Accrues, 15 I. C. C. Rep. 201.
- Venus vs. St. L. I. M. & S. Ry. Co., 15 I. C. C. Rep. 136.
- Nollenberger vs. Mo. Pac. Ry. Co., 15 I. C. C. Rep. 595.
- Nicola, Stone & Myers Co. vs. L. & N. R. R. Co., 14 I. C. C. Rep. 199, 206.
- Cattle Raisers' Assn. vs. C. B. & Q. R. R. Co., 10 I. C. C. Rep. 83, 100, 101, 102, 103, 104.
- L. V. R. R. Co. vs. Meeker, 211 Fed. Rep. 785. (See 236 U. S. 412.)
- Lyne vs. D. L. & W. R. R. Co., 170 Fed. Rep. 847.
- Carter vs. New Orleans & N. E. R. R. Co., 143 Fed. Rep. 99.
- Ratican vs. Terminal R. R. Assn., 114 Fed. Rep. 666.

CHAPTER X.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES (CONTINUED).

- § 1. Liability of Carriers for Damages Arising out of Violations of Act to Regulate Commerce.
- § 2. When Cause of Action for Damages Accrues.
- § 3. Award of Damages by Interstate Commerce Commission not a Judgment.
- § 4. Right of Reparation not Confined to Parties of Record.
- § 5. No Award of Reparation in Formal Cases Unless Prayed Therefor in Petition.

CHAPTER X.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES (CONTINUED).

§ 1. Liability of Carriers for Damages Arising Out of Violations of Act to Regulate Commerce.

In *Nicola, Stone & Myers Co. vs. L. & N. R. R. Co.*, 14 I. C. C. Rep. 199, 209, the Commission announced the following rule governing the joint and several liability of carriers for damages resulting from the violation of the Act to Regulate Commerce:—

“The complainants contend that the defendant carriers who concurred in establishing the unlawful advance in the rates under consideration are jointly and severally liable for all the damages resulting therefrom, whether or not participating in the particular rate from which the individual overcharge resulted. We cannot concur on so broad a view of the liability of the defendants. We do not think those carriers who received no part of the charges and who did not participate on the movement of the commodity should be liable to refund the whole or any part of the rate for the movement of a shipment in which they did not participate.

“We think that the liability is restricted to those carriers who participated in the transportation of the lumber via their respective routes over which the several shipments moved, and who shared in the trans-

portation charges therefor, and that such carriers are jointly and severally liable to the persons found to be entitled to the refund.

Contrasted with this holding by the Commission are the pronouncements of the courts to the effect that the charging of an illegal rate is tort, and that all carriers participating in such illegal act are joint tort-feasors, and that therefore the carriers are jointly and severally liable.

So. Ry. Co. vs. Tift, 206 U. S. 428.

See also:

Independent Refiners' Assn. vs. W. N. Y. & P. R. R. Co.,
6 I. C. C. Rep. 378, 384. (See 137 Fed. Rep. 343.)

The receiving carrier is liable for loss, the remedy therefor being cumulative.

Sec. 20, Act to Regulate Commerce.
Cummins Amendment, 33 I. C. C. Rep. 682.
La. St. Rice Milling Co. vs. M. L. & T. Ry. Co., 34 I. C. C.
Rep. 511.

Compare:—

In re Released Rates, 13 I. C. C. Rep. 550.

§ 2. When Cause of Action for Damages Accrues.

In complaint for recovery of damages caused by unreasonable or unduly discriminatory rates, the cause of action accrues when the payment is made or the owner becomes legally liable for the charges. In any other complaint for recovery of damages for alleged violations of the Act to Regulate Commerce of which the Interstate Commerce Commission has jurisdiction, the cause of action accrues when the carrier does the unlawful act or fails to do what the law requires.

The language of the Act is:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

The word "damages" evidently refers to the money value of any loss caused by any violation of the Act. When does the cause of action accrue?

In American and English Encyclopedia of Law, it is said:—

"The statute of limitations begins to run from the time when the plaintiff's cause of action accrues, unless some recognized exception postpones its operation. This rule is never questioned; the difficulty lies in determining when the cause of action is deemed as having accrued.

"A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it and no earlier."

In Bouvier's Law Dictionary it is said:

"A cause of action is said to have accrued to any person when that person first comes to a right to bring an action. A cause of action does not accrue until the existence of such a state of things as will enable the person having the proper relations to the property or persons concerned to bring action."

In the Encyclopedia of Law and Procedure it is said:

"The statute of limitations begins to run from the time when a complete cause of action accrues; that is, when a suit may be maintained, and not until that time.

"The accrual of a cause of action means the right to institute and maintain a suit; and whenever one person may sue another, a cause of action has accrued,

and the statute begins to run. So whether at law or in equity, the cause of action accrues when, and only when, the aggrieved party has the right to apply to the proper tribunal for relief. The statute does not attach to a claim for which there is no right of corresponding remedy for which judgment can be obtained.

"The true test therefore, to determine, when a cause of action has accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result.

"Every claim against the United States, cognizable in the Court of Claims, shall be forever barred unless the petition is filed within six years after the claim first accrues."

In the case of the United States vs. Clark, 96 U. S. 37, Clark was an army officer and on April 6, 1865, lost from his safe a valuable package containing \$15,979.80. He duly reported his loss to the proper Treasury officials and claimed credit for the amount. His claim was rejected in 1871, and within six years thereafter he brought his action in the Court of Claims under the Act of Congress, asking the court to find the loss was without fault on his part, and to require the amount to be allowed by the Treasury in the settlement of his account. The United States pleaded the limitaion, under the law which says:

"Every claim against the United States, cognizable in the Court of Claims, shall be forever barred unless the petition is filed within six years after the claim first accrues."

The court said:

"We think it a principle of general application that so long as a party has a cause of action delays to enforce it in a legal tribunal, so long will any legal

defense to that action be protected from the bar of the lapse of time, providing it is not a cross demand in the nature of an independent cause of action. But if we are mistaken in this, it is clear that until the accounting officer of the Treasury, has refused to recognize the sum lost as valid credit in the settlement of his account, there was no occasion to apply to the Court of Claims and the statute, if applicable in this class of claims at all, did not begin to run until then.

In the dissenting opinion of Mr. Justice Harlan, concurred in by Justice Swain, Clifford, and Strong, it was held that the claim was barred, and it was said:

“In a general way it may be said that it is a rule in courts of equity as well as in courts of law that a cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief.

In the case of the United States vs. Taylor, 104, 216, under the direct Act of August 5, 1861, requiring the surplus of real estate sales to be deposited in the Treasury and there held for the use of the owner, the United States denied the jurisdiction of the Court of Claims over the suit of Taylor, because his application to the Treasury for the surplus and the filing of his suit were both more than six years after the sale. The court said:—

“The general rule is that when a trustee unequivocally repudiates the trust and claims to hold the estate as his own and such repudiation and claim are brought to the knowledge of the *cestui que* trust in such manner that he is called upon to assert his rights, the statute of limitation will begin to run against him from the time such knowledge is brought home to him and not before.

“In analogy of this rule, the right of the owner of

the land to recover the money which the government holds for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims until demand therefor had been made by the Treasury. Upon such demand the claim first accrued, and as the suit was brought within six years from the date of demand it falls within the term of the section giving jurisdiction to the Court of Claims and is not cut off by lapse of time."

In the case of **Rice vs. United States**, 122 U. S. 611, the question arose under the six years limitation; and the court said:

"The claim first accrues within the meaning of the statute, when a suit may first be brought upon it, and from that date the six years limitation begins to run."

The Clark and the Taylor cases, hereinbefore quoted, were referred with approval.

In the case of the **United States vs. Louisiana**, 123 U. S. 32, the state of Louisiana sued the United States for \$23,855 on account of sales of swamp lands to individuals made prior to March 3, 1850, all swamp and overflowed lands unfit thereby, for cultivation and then unsold were granted to the respective states, and the Secretary of the Interior was required to prepare and transmit a list to the governors of the states and issue patents therefor. This was not promptly done and many of such lands were sold to other parties of the United States.

The Act of March 2, 1855, provided that upon proof of such sales by the states before the commissioner of the General Land Office, as to the character of the lands accepted, the field notes of the surveyor-general of the state was sufficient proof, and on the 30th of June, 1885, found the amount claimed to be due the states from the United States. The state prevailed in the court below and the

United States, having pleaded limitation, appealed to the Supreme Court. That court held:

"The statute of limitation does not seem to us to have any application to the demand arising upon the swamp-land acts. The method of proving the character of such lands by having recourse to the field notes of the public surveyor or the Surveyor-General of the state was adopted by the Commissioner as early as 1850 and was followed by him in the case of 1855. On the 30th of June of that year we found in this mode and certified that there was due to the state from such sales the amount stated above. From that date only six years within which the action could be brought in the Court of Claims began to run and this action was commenced September of the following year."

The Commission had already decided that—

"A cause of action accrues as the phrase is used in the Act, on the date on which the freight charges are actually paid."

And that—

"Claims filed since August 28, 1907, must have accrued, within two years prior to the date when they are filed, otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years limitation in the Act. This Commission will not take jurisdiction of or recognize its jurisdiction over any claims for reparation or damages which are barred by the statute of limitations, as herein interpreted, and the Commission will not recognize the right of a carrier to waive the limitation provisions of the statute. * * * The Act went into effect August 28, 1906."

The Commission has also decided that charges above the lawful rate over the route the shipment moved can be refunded by the carrier or carriers without any order of the Commission, and under Administrative Ruling No. 70 of

Tariff Circular 15-A it holds that the carrier may, in the cases therein indicated, refund all excess charges due to misrouting by its agent. The duty of the carrier is to charge and collect the lawful rate, no more and no less, and when more is collected the excess should be refunded, and when less, the deficiency should be collected. In every case the cause of action accrues only when full payment of the lawful charge has been made.

In complaints for the recovery of damages caused by the charging of rates unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, the cause of action accrues when the payment is made. In other complaints for the recovery of damages for alleged violations of the Interstate Commerce laws of which the Commission has jurisdiction, the cause of action accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed.

When a Cause of Action Accrues, 15 I. C. C. Rep. 201, 202, 203, 204.

§ 3. Award of Damages by Interstate Commerce Commission Not a Judgment.

An award of damages made by the Commission is not a judgment. It is *prima facie* evidence of such facts as are stated therein. The statutory provision empowering the Commission to award damages is merely a rule of evidence, which as to the merits of the evidence may be contested in court.

Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412.
C. H. & D. Ry. Co. vs. I. C. C., 206 U. S. 142.

See also:

Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473.
Penn. R. R. Co. vs. Clark Bros. Coal Mining Co., 238 U. S. 456.
Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184.

§ 4. Right of Reparation not Confined to Parties of Record.

The Commission has held, since the *Nicola, Stone & Myers Co. case*, 14 I. C. C. Rep. 199, 205, that the right to reparations is not confined to shipments made by parties to any particular proceeding, but extends to all shipments moving under the same circumstances and conditions and charged for on the same basis found to be unlawful by whomsoever made.

Kindelon vs. So. Pac. Co., 17 I. C. C. Rep. 251, 253.

§ 5. No Award of Reparation in Formal Cases Unless Prayed Therefor in Petition.

Reparation will not ordinarily be awarded in a formal case attacking a rate as unreasonable or otherwise in violation of law unless intent to claim reparation is specifically disclosed therein, or in an amendment thereto, filed before the submission of the case. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, specially consider a particular claim for reparation of this class.

Complaints for reparation must disclose as nearly as possible, all the claims of complainant or complainants covered by or involved in the complaint, except that when a general rate adjustment or a rate under which many shipments have been made to many destinations, or from many points of origin by many shippers, is involved, the complaint may contain specific prayer for reparation on all shipments, and the proving up as to shipments and amounts of reparation due thereon may be left until the question of the reasonableness of the rate or rates and whether or not reparation will be awarded, have been

decided. And each claimant for reparation under a decision that has been rendered must include all his shipments and claims in a complaint or statement.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 206, par. (c), (d) and (e).

The preliminary issue is always upon the reasonableness of some particular rate. The determination of this question may frequently involve a considerable length of time. The case must first be heard by the Commission. It may then go for months before any final conclusion can be reached. During this period while this fundamental question is being determined, shippers ought not to be put to the trouble and expense of filing detailed exhibits, nor ought the Commission to be burdened with the task of receiving and caring for such exhibits unless some substantial purpose is thereby subserved. The complainant should file such statement as informs both the Commission and defendants of his intention to claim reparation, which it will finally desire to use upon the trial of the case so that the details may not be dissipated.

Bluff City Oil Co. vs. St. L. I. M. & S. Ry. Co., 16 I. C. C. Rep. 296, 297.

The subject was dealt with by the Commission in its Conference Ruling No. 206, paragraph (e) above set forth.

This conference ruling was adopted in 1909. In the **Mountain Ice case**, 21 I. C. C. Rep. 45, decided in 1910, it was held that a general statement upon the part of the complainant that shipments had been made between certain points which were described in somewhat general terms under the rates in issue, on account of which reparation would be claimed, was sufficient.

Michigan Hardwood Mfrs. Assn. vs. Transcontinental Freight Bureau, 27 I. C. C. Rep. 32, 36.

Damages will be denied where reparation is not one of the issues raised in a formal proceeding.

R. R. Com. of Oregon vs. S. P. Co., 24 I. C. C. Rep. 273, 279.

Thus, a formal complaint unsupported by expense bills or other evidence and nothing brought before the Commission to prove the shipments actually moved or that the charges were collected as claimed in the complaint, will not admit of an award of reparation, even in the fact of the carriers confession of the allegations in the complaint.

International Harvester Co. vs. C. M. & St. P. Ry. Co., 18 I. C. C. Rep. 222, 223.

These rules of procedure have their essential application to formal proceedings instituted against unreasonable rates and charges. No such condition precedent to the shipper's right of recovery is required in proceedings seeking indemnitory or general damage resulting from the violation of the Act to Regulate Commerce.

Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions in law sounding in tort. Bouvier defines "reparation" as "damages for an injury; amends for a tort." If an injury is sustained on account of a violation of the law, the proceeding is in its nature *ex delicto*, and therefore carries with it none of the features or the incidents of an action *ex contractu*. In the very nature of the thing no protest is necessary where the injury is inflicted by the commission of a tort. The violation of the law produces the injury and completes the offense, and the person injured does not have to perform any conditions to entitle him to recovery for the damage sustained.

Southern Pine Lumber Co. vs. So. Ry. Co., 14 I. C. C. Rep. 195, 197.

And in a case where the shipper in a formal proceeding before the Commission proves the granting by the carrier of undue preference in certain privileges, but fails to submit sufficiently specific evidence of his loss, the Commission will allow such shipper additional time for putting in such proof.

- Carl Eichenberg vs. S. P. Co., 14 I. C. C. Rep. 250.
 Clinton Sugar Refining Co. vs. C. & N. W. Ry. Co., 28 I. C. C. Rep. 364, 367.
 Ullman vs. American Express Co., 19 I. C. C. Rep. 354, 355.
 Pope Mfg. Co. vs. B. & O. R. R. Co., 17 I. C. C. Rep. 400, 403.
 Minneapolis Threshing Machine Co. vs. C. St. P. M. & O. Ry. Co., 16 I. C. C. Rep. 193, 194.
 Long & Co. vs. International Ry. Co., 14 I. C. C. Rep. 116, 117.

The following conference ruling promulgated by the Commission July 2, 1909, is strictly adhered to with respect to procedure in formal cases involving reparation:

"Reparation will not ordinarily be awarded in a formal case attacking a rate as unreasonable or otherwise in violation of law unless intent to claim reparation is specially disclosed therein, or in an amendment thereto, filed before the submission of such case. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, deal specially with a particular claim for reparation.

"Claims for reparation based upon a decision of the Commission filed by complainants not parties to the case in which such decision was rendered will not ordinarily be allowed unless reparation was claimed in the complaint upon which such decision was based, or was awarded by the Commission. The Commission may, however, in the exercises of its discretion, upon good cause shown, and under unusual circumstances, specially consider a particular claim for reparation in this case.

"Complaints for reparation must disclose as nearly

as possible all the claims of the complainant or complainants covered by or involved in the complaint, except that when a general rate adjustment or a rate under which many shipments have been made to many destinations, or from many points of origin by many shippers, is involved, the complaint may contain specific prayer for reparation on all shipments, and the proving up as to shipments and amounts of reparation due thereon be left until the questions of the reasonableness of the rate or rates and whether or not reparation will be awarded, have been decided. And each claimant for reparation under a decision that has been rendered must include all his shipments and claims in one complaint or statement."

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 206, pars. (c), (d) and (e).

In many instances, and for divers reasons, shippers are required to pay rates which even the carrier admits are unreasonably high, and which the carrier is willing to reduce to a reasonable figure. This the carrier is not at liberty to do, in that the law does not permit the carrier to refund to the shipper any part of the established rate be it just or unjust. But the power is lodged in the Commission to pass upon a particular rate, and if it finds that such rate is unreasonable, it may fix what quantity moved, and allow as reparation to the shipper the difference between the rate actually collected and the rate found by it to have been reasonable. In cases of reduced rate or changed tariff regulation the Commission will require the maintenance of such rate or regulation for at least one year. This involves a form of procedure which it is the duty of the Commission to adhere to in its investigation of rates under the terms of the Act. That is, the party charged with alleged violation of the Act must be served with notice of the exact nature of the charges, and be afforded oppor-

tunity to be heard in its behalf, before the Commission may make a lawful order against it. This procedure in rate reparation cases, while informal practically as to the amount of the reparation, carries out in form this requirement of the law, and for that reason the Commission requires, under its so-called informal procedures, an application or petition by the applicant and admission by the carrier as equivalent to petition and answer that the rate charged was unreasonable, and that the rate stipulated as the basis of the reparation would have been a just and reasonable rate, and that the carrier will establish and collect such reasonable rate for a definite period of time, or for a lesser period on special instances, herein referred to. Thus, in theory since the Commission can do nothing in an informal proceeding that it may not do in a formal case, the same result is reached as if the Commission had conducted a formal investigation with hearing and arrived at the conclusion that the rate charged was unreasonable and fixed a reasonable rate and awarded reparation to the petitioner. In this way substantial compliance with the statute is had, and a speedy and effective system established for the disposition of claims that otherwise would cause a multiplicity of formal cases and greatly impede and hamper the work of the Commission.

To assist in the settlement of certain claims of shippers against carriers, and as a practical means of disposing with promptness of informal complaints that might otherwise develop into formal complaints, and in connection with which the unreasonableness of the rate or regulation is admitted by the interested carrier or carriers, the Commission on full information will authorize adjustment by special order if all the facts and conditions warrant such action. The connections in which the Commission has

authority to modify the provisions of the law are specified in the Act. The Commission will not assume to modify it in any other connections or features.

The instances in which the Commission will authorize refund or reparation on informal complaint and in an informal way will be confined to those in which the informal showing develops plainly a case in which the Commission would award reparation on formal hearing and in which an adjustment agreeable to complainant and carrier or carriers and in conformity with the provisions of the law is reached.

Reparation under informal proceedings will be authorized in instances where the tariff has been applied, upon the filing of an application by the carrier or carriers which participated in the transportation of the property in question, containing an admission that the rate charged was unreasonable, supported by a statement of the facts substantially showing that the charge demanded for the transportation services performed was excessive, that within a reasonable time a tariff naming the rate upon basis of which adjustment is sought has been published and that such rate has been made lawfully applicable via the route over which shipment moved. The Commission's order for refund on account of a reduced rate or changed tariff regulation will require the maintenance of such rate or regulation for at least one year.

No carrier may pay any refund from its published tariff charges save with the specific authority of the Commission in accordance with the provisions of the Act. When an informal or formal reparation order has been made by the Commission the principle upon which it is based shall be extended to all like shipments, but no refund shall be made upon like shipments except upon specific authority

from the Commission therefor. (See Confr. Ruling No. 49 and No. 200-c.)

The shipper should pay the lawfully published charges applicable via the route over which the shipment moves, and make claim for refund if he believes he has been overcharged. The Commission will not ordinarily include in reparation awards demurrage charges which accrue pending adjustment or subsequent to consignee's refusal to accept the shipment and pay the lawful charges thereon, but in special cases such demurrage charges may be included in the amount of the refund. (See Confr. Ruling No. 32.)

It is the duty of the delivering carrier to collect, and of the consignee to pay demurrage charges as per lawful tariffs. Demurrage charges accruing because of error of a carrier, are considered in the same light as are other additional transportation charges accruing because of error of a carrier, and if adjusted, the full expense thereof, must be borne by the carrier whose agent is responsible for the error. (See Confr. Ruling No. 214, and not to Ruling No. 242.)

The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some benefit of lower combination. The Commission long since extended to carriers, in a general order, permission to reduce on one day's notice, a joint commodity or class rate or fare

that is higher than the sum of the intermediate rates between the same points. If, therefore, carriers have maintained through rates or fares that are higher than the sums of the intermediates between the same points, it is because of their desire to do so, and not, as some agents of carriers have informed shippers, because the law or the Commission forces them to do so. (See Ruling No. 56, Tariff Circular No. 18-A.)

If a carrier desires to give his patrons the benefit of the same rate or fare that applies via another line or gateway, and which is lower than its own fare, it can do so by lawfully incorporating that rate or fare in its tariffs, and so give the benefit to all of its patrons alike. The law forbids giving such lower rate or fare to one and withholding it from another, but neither the law nor the Commission stands in the way of adoption in lawful manner of the lower rate or fare, as available for all. (See Confr. Ruling No. 205.)

The Commission's power to authorize adjustments will not be exercised in such way as to create the very discriminations which the law aims to prevent. No doubt instances will occur in which seeming hardships will come to some. Much of such embarrassment will be avoided if agents of carriers and shippers take pains to be certain that correct rates are quoted and correct routing is given.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 220, pars. (a), (b), (d), (e), (f), (g), (h), (i) and (j).

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 396.

It became apparent that the effect of the one year clause in special reparation orders was to tie up the carriers tariffs in such manner as to result in much embarrassment not only to the carriers, but to the shippers as well. After a conference with the representatives of the carriers, the

Commission, on June 22, 1909, modified its practice in special reparation cases, in the following respects:

In special docket cases no order as to the rate for the future shall be entered when the joint rate at the time of shipment exceeded the aggregate of the intermediate rates, or in cases where at the time the shipment moved the rate for a short haul was greater than the rate for a long haul over the same route, or line, in the same direction, the shorter being included within the longer distance and the rates have been subsequently changed in such manner, that at the time the order of the Commission is entered the rate for the shorter distance does not exceed the rate of the longer distance.

Where there is a natural geographical relation between the point involved and other points, which relation the carrier has theretofore expressed in its tariffs by grouping that point with other points, either with respect to rates on the commodity in question, or with respect to rate on other commodities, or with respect to class rates, the order may require the maintenance of the group relation for one year from the date of the application instead of requiring an absolute rate to or from the point in question.

Where the rates on a product of a raw material have had definite relation to the rates on the raw material, and that relation has been temporarily disturbed and subsequently restored, the order may control the relation for one year instead of fixing an absolute rate on the product.

Where a carrier is compelled to charge a higher rate than was intended because of error in printing tariff, the one year clause may be omitted only where the error is specifically called to the attention of the Commission within ninety days after the tariff containing the error has been filed.

Supplementary to these modifications above set forth, the Commission gave further utterance with respect to special reparation claims on the informal docket, as follows:

"Because of the uncertain condition of the tariffs of carriers the Commission has been rather liberal in the past in the conduct of its special reparation docket and purposes, in order to help carriers dispose of claims that have accumulated in the past, to continue this policy for the present. It is manifest, however, that the time is approaching when in the general interest of all concerned the Commission must adopt a different attitude. We take occasion therefore now to say that the Commission will cooperate with carriers, so far as that may legally be possible, in the effort to get all old claims disposed of, and, with respect to shipments made prior to September 1 next, will pursue its present policy of liberality. But with respect to shipments moving on and after that date the Commission will draw lines much more closely, and will adopt such measures as will materially narrow the scope of its activities in that connection. We are not prepared at this time to define in detail what our policy in the future will be. It may be well, however, now to say that after that date we shall not award reparation, either on the formal or the special docket, in any case where the carrier in question has reduced a rate simply in order to meet the lower rate of the competitor. Any other course of action not only deprives the competitor of the natural benefits of its lower rate, but tends to destroy the inducements for making a lower rate. Moreover, any other course of action is demoralizing in that it enables the carrier, before its own lower rate has become effective, to assure shippers that they may ship by its line notwithstanding its higher rate and afterwards secure reparation on the basis of the lower rate of its competitor. Where there is a difference in rates between two points over different lines, shippers must under-

stand that they may get the benefit of the lower rate only by sending their merchandise over the line publishing the lower rate. (See Confr. Ruling No. 205.)

"It may be well also to announce that it has been suggested that when reparation is granted on a complaint, either in a formal or informal proceeding, on a finding that the rate under which his shipment moved was excessive and therefore unlawful, the spirit of the law requires that the order ought also to compel the carrier to make a refund on the same basis on all other shipments, moving after the date of the filing of any such complaint, under the rate thus condemned. While no conclusion has been reached there is force in the view and it will have further consideration." (See Confr. Ruling No. 49; amended by Ruling No. 220-(d).)

"The suggestions that have come to us from various quarters in relation to the conduct of the special reparation docket indicate that some misapprehension exists as to the purpose of that docket, and as to the authority of the Commission in dealing with such cases. It may be well, therefore, to say that our action in special reparation cases has no authority in law except the authority upon which we take similar action in formal cases. In all cases, whether on the formal or the special docket, the law in section 15 specifically requires a complaint and answer and a full hearing; and in section 14 it is provided that where damages are awarded the report of the Commission shall include the findings of fact on which the award is made. We have endeavored to simplify the procedure on the special docket by accepting the application of the carrier as the equivalent of a complaint and answer, and by accepting its admissions that the rate charged under the circumstances then existing was unreasonable as a sufficient compliance with the requirements of section 15 for a full hearing. The informality in the pleadings in such cases seems to have led some carriers as well as shippers into the error of supposing that special reparation cases can

be disposed of still more informally. This, however, is a mistaken view of our authority. The special docket is not an informal docket in any sense of the word, except in respect to the form of the pleadings and the character of the hearings. Our orders in such cases must be regarded as formal orders as fully in all respects as our order in formal cases. The Commission can exercise no authority on the informal docket that it cannot exercise on the formal docket, nor may it omit requirements with respect to cases on the special docket that the law imposes upon us in the disposition of cases on the formal docket." (See Confr. Ruling No. 14 and 220).

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 200.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 425. Superseding Ruling No. 376 and modifying Ruling No. 200, par. (a)-1.

See also:

Marian Coal Co. vs. D. L. & W. R. R. Co., 27 I. C. C. Rep. 441, 442.

Esson Granite Co. vs. So. Ry. Co., 26 I. C. C. Rep. 449, 450.

Swift & Co. vs. C. & A. R. R. Co., I. C. C. Rep. 426, 428.

Unrep. Op. 126.

CHAPTER XI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES (Concluded).

- § 1. The "Measure of Damages."
 - (1) Account Unreasonable Rate.
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- § 11. Award of Damages May Be for Profits Lost.
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- § 13. Reparation Awarded Account Accident of Billing.

CHAPTER XI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

DAMAGES (Concluded).

§ 1. The "Measure of Damages."

The measure of damages where an unreasonable rate has been charged is ordinarily the difference between what should have been paid as a reasonable rate and what was wrongfully exacted by the carrier. In other words, the one paying an unreasonable rate is entitled, as a matter of law, to an award of reparation in the amount of the difference between the rate paid and rate which should have been paid.

Gardner vs. So. Ry. Co., 10 I. C. C. Rep. 342, 350, 351.
Junod vs. C. & N. W. Ry. Co., 47 Fed. Rep. 290.
Osborne vs. C. & N. W. Ry. Co., 48 Fed. Rep. 49.
C. & N. W. Ry. vs. Junod, 52 Fed. Rep. 912.
C. & N. W. Ry. Co. vs. Osborne, 52 Fed. Rep. 912.
Osborne vs. C. & N. W. Ry. Co., 146 U. S. 364.
Junod vs. C. & N. W. Ry. Co., 146 U. S. 364.
Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447.

See also:

In re Wool, Hides and Pelts, 25 I. C. C. Rep. 675, 677.
National Wool Growers' Assn. vs. O. S. L. R. R. Co., 25 I. C. C. Rep. 675, 677, 678.
Sondheimer vs. I. C. R. R. Co., 20 I. C. C. Rep. 606, 611.
Ottumwa Bridge Co. vs. C. M. & St. P. Ry. Co., 14 I. C. C. Rep. 121, 126.

The measure of damages where indemnitory or general damages are sought for violations of the Act to Regulate

Commerce is the actual pecuniary damage suffered by the injured person. The language of the statute is that "the transgressing carrier is liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation." (Sec. 8, Act to Regulate Commerce).

The lower court, in the same case, ruled that the measure of damages recoverable in such a case was the difference between the amount paid by the shipper and the amount he would have paid at the lowest rate charged on any other shipments carried under substantially similar circumstances and conditions during the same time.

Pennsylvania R. R. Co. vs. International Coal Mining Co.,
173 Fed. Rep. 1.

The Pennsylvania State Supreme Court, in the **Hillsdale Coal & Coke Co. case**, stated the rule as follows:—

"As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine.

Hillsdale Coal & Coke Co. vs. Pennsylvania R. R. Co.,
229 Pa. 61, 78 Atl. 28.

Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S.
121.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S.
304.

Mitchell Coal Co. vs. Pennsylvania R. R. Co., 230 U. S.
247, 257.

I. C. C. vs. I. C. R. R. Co., 215 U. S. 452.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 183
Fed. Rep. 929.

Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 176
Fed. Rep. 748.

(1) **Account Unreasonable Rate.** The Commission holds that the payment of an unreasonable rate creates

a right of action against the carrier, and that the measure of damages, ordinarily, is the difference between the rate paid and what would have been a reasonable rate for the transportation service rendered. When, therefore, it appears that an unreasonable rate has been paid, the one paying it is entitled to an award of reparation in the amount of the difference between the rate paid and the rate which should reasonably have been paid.

The statute provides that no order for reparation shall be made by the Commission unless claim is filed with it within two years from the time the cause of action accrues, and it seems to be a general assumption on the part of shippers that whenever the Commission holds a given rate to be unreasonable, it will, as a matter of course, award reparation upon the basis of the rate found to be reasonable as to all shipments within the two year limitation. This is by no means so, since it does not of necessity follow that because a rate is found unreasonable upon a given date it has been unreasonable during the two years preceding, and reparation can only be granted where it is found that the charge was unreasonable when paid.

There is no exact standard by which the reasonableness of a rate can be measured. While there are many facts capable of precise determination which bear upon that question, the final answer is a matter of judgment. The traffic official who establishes the rate exercises his judgment in the first instance, and the Commission when it revises that rate substitutes its judgment for that of the traffic official. With varying conditions the reasonableness of a rate itself may vary, so that the rate which is reasonable today may be unreasonable tomorrow.

In every case the Commission must fix the point of time when the rate becomes unreasonable, must determine

when shippers were entitled, and when carriers ought to have established the rate found reasonable. Manifestly each case must depend upon its own facts, and the complainant must assume the burden of showing that the rates paid have been unreasonable.

In re Wool, Hides and Pelts, 25 I. C. C. Rep. 675, 677.
Sondheimer vs. I. C. R. R. Co., 20 I. C. C. Rep. 606, 611.
Ottumwa Bridge Co. vs. C. M. & St. P. Ry. Co., 14 I. C. C. Rep. 121, 126.

See also:

Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447.
Junod vs. C. & N. W. Ry. Co., 146 U. S. 264.
Osborne vs. C. & N. W. Ry. Co., 48 Fed. Rep. 49.
Junod vs. C. & N. W. Ry. Co., 47 Fed. Rep. 290.

It must be borne in mind that it is not the province of the Commission to allow reparation simply because a shipper is willing to receive a refund and the carrier is agreeable to the making of it, but the unreasonableness of the rate at the time it was applied to a particular shipment must be affirmatively shown to justify a refund therefrom under the authority of the Commission. And the measure of the damages, in such a case, is, in general terms the difference between the rate paid and the reasonable rate as determined by the Commission which should have been applied to the shipment.

Commercial Club of Omaha vs. A. & S. R. R. Co., 18 I. C. C. Rep. 532.
Enns Milling Co. vs. C. R. I. & P. Ry. Co., 34 I. C. C. Rep. 197, 201.
Ballou & Wright vs. N. Y. N. H. & H. R. R. Co., 34 I. C. C. Rep. 120, 121.
The Tap Line Case, 34 I. C. C. Rep. 116, 118.
Kindelon vs. S. P. Co., 17 I. C. C. Rep. 251.
Pacific Ele. Co. vs. Chicago, etc., R. R. Co., 17 I. C. C. Rep. 373.
Pabst Brewing Co. vs. Chicago, etc., R. R. Co., 17 I. C. C. Rep. 359.
Allen & Co. vs. Chicago, etc., R. R. Co., 16 I. C. C. Rep. 293.

- Flint & Walling Mfg. Co. vs. L. S. & M. S. R. Co., 14 I. C. C. Rep. 336.
Cohen & Co. vs. S. Ry. Co., 16 I. C. C. Rep. 177.
American Refractories Co. vs. E. J. & E. R. R. Co., 15 I. C. C. Rep. 480.
Burgess vs. Transcontinental Freight Bureau, 13 I. C. C. Rep. 668, 679.
American Grass Twine Co. vs. Chicago, etc., R. R. Co., 12 I. C. C. Rep. 141.
Johnston vs. St. Louis, etc., R. R. Co., 12 I. C. C. Rep. 73.
Grain Shippers' Assn. vs. I. C. R. R. Co., 8 I. C. C. Rep. 158.
Perry vs. Fla. Cent. R. R. Co., 5 I. C. C. Rep. 97, 3 I. C. C. Rep. 740.

See also:

- Darnell-Taenzer Lumber Co. vs. So. Pac. Co., 221 Fed. Rep. 890.
Gardner vs. So. Ry. Co., 10 I. C. C. Rep. 342, 350, 351.
Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 50, where the Commission held that it is manifestly impractical for the carriers or the Commission to determine at what exact time in the gradual process of changes the rate becomes unreasonable.

Compare:

- Phoenix Printing Co. vs. M. K. & T. Ry. Co., 31 I. C. C. Rep. 289, 293.
Cairo Milling Co. vs. M. & O. R. R. Co., 40 I. C. C. Rep. 20, 22.
Bristol Door & Lumber Co. vs. So. Ry. Co., 40 I. C. C. Rep. 69, 70.

(2) **Account Discriminations in Rates.** An award of the Commission in reparation of damages resulting from a violation of the Act to Regulate Commerce is not enforceable as such, but in a suit in court for such damages the findings and order of the Commission are *prima facie* evidence in support thereof. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another.

The standard of the law by which the validity of any rate as affected by its amount is determined, is not more definite than that it must be reasonable and just. The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rates in effect at that time. In the nature of the cases there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration.

Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 49.

Whatever may be the nature of the facts, circumstances and conditions appearing in a particular case where reparation is involved, whether on account of excessive rates or by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well established principles of law as basis for a judgment in court.

Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 51.

While it is proper under the provisions of the Act to Regulate Commerce to award reparation where a discriminatory freight rate has been exacted, it does not necessarily follow that because a rate found to be unjustly discriminatory and unduly prejudicial the complaining parties are the ones who have been injured through its exaction.

Curry & Whyte Co. vs. D. & I. R. R. Co., 30 I. C. C. Rep. 1, 14.

There is nothing in the Act to Regulate Commerce from which a presumption of damages can be inferred, and it has never been so held.

The wording of the Act is as follows:—

“That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter or thing, in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of the damages sustained in consequence of any such violation of the provisions of this Act.”

As said in *Parsons vs. C. & N. W. Ry. Co.*, 167 U. S. 447 and quoted in *Pa. R. R. vs. International Coal Co.*, 230 U. S. 200 in construing this section:—

“Before any party can recover under the Act he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury.”

And in *Pa. R. R. Co. vs. International Coal Co.*, *supra*, it was said:

“Congress had not then and has not since given any indication of an intent that persons not injured might nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.

“Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain such a recovery before a court of law.

Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 51.

A mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make a *prima facie* case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other

words, he must establish the fact of his damage as well as the amount of damage he claims.

In *Pa. R. R. Co. vs. International Coal Mining Co.*, *supra*, it was held that a mere finding of unjust discrimination without proof of actual pecuniary loss suffered will not authorize a finding for reparation.

When a complaining person seeks at the hands of the Interstate Commerce Commission an award of torts, the rule that one who suffers a tort injury, must use reasonable diligence to avoid or minimize his loss, becomes applicable. Thus in a case where a shipper had notice of the accumulation of his cars at a certain point and was, in fact, put upon notice as to the detention, he could, when the carrier took the position that the cars should not be moved from such point until reconsigning orders were given at the point, even though he (the shipper), regarded the carrier's position as unjustifiable, have temporarily acceded, giving the reconsigning orders, sold or delivered his shipments and so avoided the loss, or at least a portion of it that resulted from the carrier's alleged unlawful action, saving at the same time his right to have the question of the lawfulness of the carrier's conduct determined by the Commission. The obligation of reasonable diligence to avoid loss, the Commission holds, required such a course on his part, and in the absence of such diligence, the Commission may not properly award compensation for such losses, if any actually resulted from the detention.

Beeker vs. Pere Marquette R. R. Co., 28 I. C. C. Rep. 645, 658.

The courts meet with the same difficulties in awarding general or tort damages as the Interstate Commerce Commission experiences, and the rules for fixing other kinds of

damages should be applied when a shipper is injured by the exaction of an illegally discriminating rate.

In a case where the shipper sought to recover damages in an award of reparation by the Commission against a carrier for giving a rebate to another shipper, the Supreme Court affirmed the act of the Commission saying:

"Where a shipper without proving that he sustained any damage, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, said (p. 203):

'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid'.

'Those damages might be the same as the rebate or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered.' "

Pennsylvania Railroad Co. vs. International Coal Mining Co., 230 U. S. 184.

In the **Mills case** the Supreme Court passed upon the contention that a finding by the Commission that the complaining shipper was entitled to a stated amount "as reparation" was not equivalent to a finding that he was damaged, saying:

"What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole,—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid "as reparation" on the specified shipments was the amount which they found necessary to accomplish the reparation—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as **prima facie** evi-

dence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, **prima facie** the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case.

Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473, 59 L. Ed.—

See also:

Naylor & Co. vs. Lehigh Valley R. R. Co., 15 I. C. C. Rep. 9.
Naylor & Co. vs. Lehigh Valley R. R. Co., 18 I. C. C. Rep. 624.

So, where it did appear from the showing made before the Commission that the complaining shipper had not been damaged by the payment of a lower rate by another shipper not in competition with him, reparation was refused.

Carter White Lead Co. vs. N. & W. Ry. Co., 21 I. C. C. Rep. 41, 44.

But in a case where the complaining parties had paid higher rates than other shippers similarly situated, the Commission held the complaining parties unjustly discriminated against and damaged, and awarded reparation for their pecuniary loss.

Meeker & Co. vs. Lehigh Valley R. R. Co., 21 I. C. C. Rep. 129, 137.

Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412, 59 L. Ed.—

See also:

Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473.
Du Pre Co. vs. B. R. & P. Ry. Co., 23 I. C. C. Rep. 226, 227.
Sondheimer vs. I. C. R., 20 I. C. C. Rep. 606, 611.
Penn. Tobacco Co. vs. O. D. S. S. Co., 18 I. C. C. Rep. 197.
Diehl & Co. vs. Chicago, M. & St. P. R. Co., et al., 16 I. C. C. Rep. 190.
Menefee Lbr. Co. vs. T. & P. R. Co., 15 I. C. C. Rep. 49.

Compare:—

Lehigh Valley R. R. Co., 238 U. S. 473.

Another measure of damages in discrimination in rates arises where the discrimination takes the form of preferential allowances, such as for elevation of grain, and in that case, the Commission will allow damages equal to the amount which would have accrued to the shipper discriminated against by way of the elevation allowances if the tariff had not contained the discriminatory provisions for the allowance. In other words, it would amount to the difference between what has been paid to the favored shippers and the claimant.

Nebraska-Iowa Grain Co. vs. Un. Pac. R. Co., 15 I. C. C. Rep. 90.

Compare:

Este Co. vs. A. C. L. R. R. Co., 34 I. C. C. Rep. 469, 471.

A presumption of damage will not be inferred, but proof must be made of such evidentiary factors as would be required to sustain such recovery before a court of law.

Hormel & Co. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 98, 102.

See also:

N. O. Bd. of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 32, 33.

(3) **Account of Overcharge.** The measure of damages where the shipper has been charged more than the established tariff rate is the difference between the rate actually charged and the established tariff rate.

Katzmaier vs. Atchison, etc., R. Co., 14 I. C. C. Rep. 528.

Dewey vs. B. & O. R. Co., 11 I. C. C. Rep. 475.

Diamond Mills vs. B. & M. R. Co., 9 I. C. C. Rep. 311.

See also:

- Spaulding Elevator Co. vs. Can. Pac. R. R. Co., 40 I. C. C. Rep. 22, 23.
- Re When a Cause of Action Accrues, 15 I. C. C. Rep. 201, 204.
- Forster Bros. Co. vs. D. S. S. & A. Ry. Co., 14 I. C. C. Rep. 232, 236.
- Mitchell Grain Co. vs. Mo. Pac. R. Co., 13 I. C. C. Rep. 566.
- Re Refrigeration of Fruit, 11 I. C. C. Rep. 129, 144.

An "overcharge" as the term is used by the Commission is confined, in its meaning to the excess demanded and collected by carriers over the lawful tariff rate, and any such amount exacted by the carrier in excess of the rate prescribed in the published tariff for a service covered thereby is recoverable by the shipper.

- Tyson & Jones Buggy Co. vs. A. & A. Ry. Co., 17 I. C. C. Rep. 330, 332.
- American Sugar & Refining Co. vs. D. L. & W. R. R. Co., 207 Fed. Rep. 733, 736.

Where straight overcharges have been collected in excess of the lawfully published rate, they may, and should be refunded without an order of the Commission.

- Priesmeyer Shoe Co. vs. C. & A. R. R. Co., 23 I. C. C. Rep. 78, 80.
- Cohen & Co. vs. Mallory S. S. Co., 23 I. C. C. Rep. 374, 375.
- Casey-Hedges Co. vs. A. G. S. R. R. Co., 23 I. C. C. Rep. 249, 250.
- American Cigar Co. vs. P. & R. Ry. Co., 20 I. C. C. Rep. 81.
- Georgia-Carolina Brick Co. vs. So. Ry. Co., 20 I. C. C. Rep. 148.
- National Refrigerator & Butcher Supply Co. vs. I. C. R. R. Co., 20 I. C. C. Rep. 64, 65.
- Pacific Coast Biscuit Co. vs. S. P. & S. Ry. Co., 20 I. C. C. Rep. 546, 549.
- Riverside Mills vs. Ga. R. R. Co., 20 I. C. C. Rep. 423, 424.
- Isbell-Brown Co. vs. M. C. R. R. Co., 15 I. C. C. Rep. 616, 617.
- Gus Momsen Co. vs. Gila Valley, Globe & Northern Ry. Co., 14 I. C. C. Rep. 614.

Shippers should not be deprived of their money as straight overcharges by disagreements between carriers as to which carrier was responsible for the overcharges.

Refund should be made to shipper by the collecting carrier, and the Commission should not be resorted to with suits growing out of differences of this character.

Edison Portland Cement Co. vs. D. L. & W. R. R. Co., 20 I. C. C. Rep. 95, 96.

Tyson & Jones Buggy Co. vs. A. & A. Ry. Co., 17 I. C. C. Rep. 330, 332.

Forster Bros. Co. vs. D. S. S. & A. Ry. Co., 14 I. C. C. Rep. 232, 234.

See also:

Rehberg & Co. vs. Erie R. R. Co., 17 I. C. C. Rep. 508, 510.

Ludowici-Celadon Co. vs. Fla. E. Coast Ry. Co., 35 I. C. C. Rep. 81, 82.

The Commission has no authority to control the disposition of an overcharge. The carrier must charge no other than its lawful rate and the failure to collect the full rate as to any shipment is a violation of the law, as is the collection of more than the full rate. The Commission declines to declare that an overcharge may be offset as against an uncollected undercharge; such offset is not within the power of the power of the Commission to authorize or condemn.

I. C. C. Confr. Rulings Bull. No. 6. Ruling No. 323.

(See also Rulings Nos. 48 and 133.)

Laning-Harris Coal & Grain Co. vs. St. L. & S. F. R. R. Co., 15 I. C. C. Rep. 37, 38.

Falls & Co. vs. C. R. I. & P. Ry. Co., 15 I. C. C. Rep. 269, 273.

(4) **Account Violation of Long and Short Haul Clause (Fourth Section).** The fourth section as originally enacted was not effective in preventing a violation of the long-and-short-haul rule, and it has been for many years understood that this rule was habitually disregarded. By amendment effective June 18, 1910, that section was strengthened. This amendment provided that in cases

where the rule of the fourth section was being violated, carriers might file with the Commission, on or before a certain date, applications asking leave to continue to disregard the long-and-short-haul rule, and that no carrier should be treated as in default of the amended fourth section until the Commission had investigated and passed upon the application.

Under this provision over 5,000 applications were filed before the date fixed. It plainly appears from the action of Congress in providing that no carrier should be proceeded against for a violation of the fourth section until its application had been acted upon, that it was the intent of the Congress to say that matters should be left *in statu quo* until that time. It would be inconsistent to grant reparation for a disregard of the fourth section during that period in which the law making authority has expressly sanctioned existence of such disregard. Therefore the Commission ruled:—

“Without undertaking, therefore, to lay down any rule as to the granting of reparation for violations of the fourth section, we hold that no damages can be given up to the time when the Commission passes upon these fourth-section applications, unless possibly, a case is made out under the third section, which might carry with it an intermediate award of damages, or unless under the first section the rate to the intermediate point has been unreasonable.

Appalachia Lumber Co. vs. L. & N. R. R. Co., 25 I. C. C. Rep. 193, 197.

Janesville Clothing Co. vs. C. & N. W. Ry. Co., 26 I. C. C. Rep. 628, 630.

Nix & Co. vs. So. Ry. Co., 31 I. C. C. Rep. 145, 150.

See also:

Osborne vs. C. & N. W. Ry. Co., 48 Fed. Rep. 49.

Contrasted to this construction of the statute by the Commission, it was held by the courts that in a suit for damages for violating the fourth section of the Act to Regulate Commerce brought in the United States circuit court the measure of damages is the difference between the amount paid for the shorter haul and the charge for the longer haul; to which may be added interest from the date of the last payment.

Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447.
C. & N. W. Ry. Co. vs. Junod, 146 U. S. 364.
C. & N. W. Ry. Co. vs. Junod, 52 Fed. Rep. 912.
C. & N. W. Ry. Co. vs. Osborne, 52 Fed. Rep. 912.
Osborne vs. C. & N. W. Ry. Co., 48 Fed. Rep. 49.
Junod vs. C. & N. W. Ry. Co., 47 Fed. Rep. 290.

Compare Conference Ruling No. 385 holding that when a higher passenger fare was charged to an intermediate point than was in effect to a more distant point over the same route, the discrimination in the carrier's tariff having been corrected, the Commission will entertain an application by the carrier to be permitted to make refund on the basis of the lower fare to the more distant point.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 385.

(5) Account Excess Weight Resulting in Overcharge.
An overcharge accruing on account of excess weight over actual weight of shipment is a straight overcharge above the established tariff rate, and should be refunded to the rightful holder of the bill of lading without any order of the Commission.

Central Com'l Co. vs. M. J. & K. C. R. Co., et al., 15 I. C. C. Rep. 25.

The measure of the damages would, of course, be the difference between the billed weight and the actual weight of the shipment at the established tariff rate applicable to the whole shipment.

(6) **Account Discrimination in Facilities.** Reparation for a tort or general damages resulting from unjust discrimination in the furnishing by the carrier of facilities of transportation, in violation of the Act to Regulate Commerce, may be awarded by the Commission under its general authorization to make awards of damages. The measure of such indemnitory damages is the proven actual pecuniary loss suffered by the injured or damaged person.

The statute provides that the measure of indemnitory damages for violations of the Act in the furnishing of the required facilities and instrumentalities of transportation shall be the full amount of damages sustained in consequence of such violation. Such pecuniary loss or damage must be as sufficiently proven before the Commission may make an award of damages as would be required to support such a recovery in a court of law.

- Penn. R. R. Co. vs. Clark Bros Coal Co., 238 U. S. 456.
 Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 23 I. C. C. Rep. 186.
 Bulah Coal Co. vs. P. R. R. Co., 20 I. C. C. Rep. 52.
 Jacoby vs. P. R. R. Co., 19 I. C. C. Rep. 392.
 Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356.
 Mills vs. L. V. R. R. Co., 238 U. S. 473.
 Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S. 304.
 Weinman vs. De Palma, 232 U. S. 571.
 Robinson vs. B. & O. R. R. Co., 222 U. S. 506.
 B. & O. R. R. Co. vs. U. S., 215 U. S. 481.
 Morrisdale Coal Co. vs. P. R. R. Co., 183 Fed. Rep. 929.
 Morrisdale Coal Co. vs. P. R. R. Co., 176 Fed. Rep. 748.
 Becker vs. Pere Marquette R. Co., 28 I. C. C. Rep. 645, 657.
 Bulah Coal Co. vs. Penn. R. R. Co., 20 I. C. C. Rep. 52.
 Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 19 I. C. C. Rep. 356.
 Clarke Bros. Coal Min. Co. vs. Penn. R. R. Co., 19 I. C. C. Rep. 392.
 Naylor vs. L. V. R. R. Co., 18 I. C. C. Rep. 624.
 Naylor vs. L. V. R. R. Co., 15 I. C. C. Rep. 9.
 Hillsdale Coal & Coke Co. vs. Penn. R. R. Co., 229 Pa. 61, 78 Atl. Rep. 28.

Compare earlier rulings:

Eaton vs. Cinn. H. & D. R. Co., 11 I. C. C. Rep. 619, 626.
Glade Coal Co. vs. B. & O. R. R. Co., 10 I. C. C. Rep. 226.
Paxton Tie Co. vs. D. S. R. Co., 10 I. C. C. Rep. 422, 426.
Gardner & Clarke vs. S. R. Co., 10 I. C. C. Rep. 342, 349.
Richmond Ele. Co. vs. P. M. R. Co., 10 I. C. C. Rep. 629, 638.

In the **Hillsdale Coal & Coke Company case** (23 I. C. C. Rep. 186, 194), in assessing damages for unjust discrimination in the distribution of coal-car equipment, the Commission followed the rule laid down in *Hillsdale Coal & Coke Co. vs. P. R. R. Co.*, 229 Pa., 61, 78 Atl., 28, which is stated by the Supreme Court of Pennsylvania as follows:

“As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonable fair profit or whatever is shown to be the fairly proper output of the mine discriminated against, less what was actually shipped from that mine.

“Counsel for appellant argued that because, as a result of the defendants’ discrimination, the coal of the plaintiff was left in the ground, and might be available for the future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages if it could do so, and it offered no evidence for any such purpose.

“The Commission declined to give their opinion as to the correctness of this rule, but dealt “with the

claims" only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation.

(7) **Account Carrier's Failure to Post Rates.** Where actual damage results to a shipper by reason of the carrier's failure to post its tariff in accordance with the requirements of the statute, the measure of damages is the difference between the rate which the shipper would have paid had the tariff been posted and the rate which he actually did pay, was the rule laid down by the Commission prior to its holding in the *Franke Grain Co.* case.

Kiel Woodenware Co. vs. C. M. & St. P. Ry. Co., 18 I. C. C. Rep. 242, 244, following *Joyes vs. P. R. R. Co.*, 17 I. C. C. Rep. 361.

This rule was modified by the Commission in ***Franke Grain Company vs. I. C. R. R. Co.***, 27 I. C. C. Rep. 625, 627, 628, to conform with the views of the Supreme Court.

The Supreme Court in ***Illinois Central Railroad Co. vs. Henderson Elevator Co.***, 226 U. S. 441, had held that:

"The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the railroad company, the plaintiff in error because of a loss alleged to have been sustained by an erroneous quotation by the agent of the railroad company of the freight rate on corn shipped in interstate commerce from the station of the railroad company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent, when in fact the rate is fixed by the published tariff on file with the Interstate Commerce Commission and effective at the time was 13½ cents per hundred pounds. On the trial before the jury the court instructed that if the loss sustained by the

plaintiff was occasional and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff containing the rate in question, and by reason of any erroneous quotation by defendant of its freight rate from and to the points in question of which plaintiff complains * * * there should be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Kentucky 220), this writ of error was sued out.

"It is clear to us that the action of the court below in affirming the judgment of the trial court and the reasons upon which the action was based were in conflict with the rulings of this court interpreted and applying the Act to Regulate Commerce. **New York Central R. R. vs. United States**, 212 U. S. 500, 504; **Texas & Pacific R. R. Co. vs. Mugg**, 202 U. S. 242; **Gulf Railroad Co. vs. Hefley**, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. **Kansas City So. Ry. vs. Albers Comm. Co.**, 223 U. S. 573, 594.

In the **Miller case** (**U. S. vs. Miller**, 223 U. S. 599) the Supreme Court passed upon the question whether compliance with the requirements of the Act in respect to posting tariffs in depots, stations, or offices, of the carrier is essential to make a tariff lawfully effective, saying:—

"It is the contention of the defendants that a tariff is not published in the sense in which the Act uses that term unless printed copies are 'kept posted in two public and conspicuous places in every depot,' etc., and it was this contention that prevailed in the Circuit Court. But, in our opinion, it is not sound. Publication and posting in the sense of the Act are essentially distinct. This is the import of the provi-

sion that the requirements relating to "publishing, posting, and filing," may be modified by the Commission in special circumstances, for if publishing included posting mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, which the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the Act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed.

"Like views of the posting clause were expressed in the *Texas & Pacific Railway Co. vs. Cisco Oil Mill*, 204 U. S. 449, and upon further consideration we perceive no reason for departing from them. * * *

"Whether by failure to comply with that clause, a carrier becomes subject to a penalty is apart from the present case and need not be considered."

The Commission in view of these decisions of the Supreme Court modified its conclusion in the *Kiel Wood-ware* case, *supra*, and announced its views, in ***Franke Grain Co. vs. I. C. R. R. Co.***, 27 I. C. C. Rep. 625, 628, as follows:

"In view of the decisions of the Supreme Court above mentioned, it is our conclusion that we may

not award the damages which the complainant alleges it has suffered in this case; and the rule announced in the Kiel Woodenware case, *supra*, is modified accordingly.

"This case illustrates the gross injustice that may result to shippers who are misled by reason of default of carriers in respect to posting tariffs as required by law, and therefore the necessity for rigid enforcement of these requirements. The Commission deems it proper in this connection to draw attention to the provisions of the act in this respect. Section 6 provides that schedules of rates shall be plainly printed in large type, and that copies for the use of the public should be kept posted in every depot, station, or office of each carrier where passengers or freight respectively are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. This section gives the Commission certain discretion to modify the provisions as to posting. Under the rules of the Commission, however, every carrier must keep on file, subject to the public inspection at stations where property is received for transportation, its current rates from such stations. * * *

"The Elkins Act provides that a fine of not less \$1,000 nor more than \$20,000 shall be incurred by any carrier failing to publish its rates in the manner provided above.

"The Commission will request the prompt prosecution of carriers who fail to meet the above requirements of the law. It will make investigation on its own account to determine the state of tariff files of stations, and will receive and act upon information from any person having knowledge of such failure."

See also:

Faribault Furniture Co. vs. C. G. W. R. R. Co., 25 I. C. C. Rep. 40.

Canadian Valley Grain Co. vs. C. R. I. & P. Ry. Co., 19 I. C. C. Rep. 108.

(8) **Account Misrouting of Shipment.** Where a carrier disregards the routing instructions of a shipper, or, in the absence of positive routing instructions from the shipper, routes the shipment via an indirect and expensive route instead of via a more direct and cheaper one, thereby resulting in needless expense to the shipper, the shipper may recover for his actual damages. In the absence of any general damages which might result to the shipper by reason of the misrouting, the measure of damages is the difference in the cost of the route over which the shipment actually moves and that of the route selected by the shipper or that of the more direct and cheaper route which was available to the carrier at the time the shipment moved.

The Act provides that "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe," the shipper, "shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to the route, and it shall be the duty of said connecting carriers to receive said property, and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading; **provided, however,** that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines

so constituting a portion of said through line or route his freight shall be transported."

Sect. 15, Act to Regulate Commerce.

In the Conference Rulings of the Commission it is held that the carriers may not disregard the instructions of shippers as to intermediate routing, except when tariff of initial line reserves the right to the carrier to dictate intermediate routing. When such reservation is made in the tariff, (1) where all-rail rates and rail-and-water rates are available the agent of the carrier must have the shipper designate which of the two he wishes to use; and (2) the agent must not route shipment via a route that will be more expensive to the shipper than the one desired by him, or that does not furnish substantially as good and expeditious service. If carrier is not willing to observe the intermediate routing instructions of shipper it must not execute a bill of lading containing such routing. Carriers will be held responsible for routing shown on bill of lading. (See Conference Rulings 190, 284 and 316; amended by Ruling 321.)

In the absence of specific through routing by shipper which carrier is willing to observe, it is the duty of the agent of the carrier to route shipment via the cheapest reasonable route known to him of the class designated by the shipper.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 214, pars. (b) and (c).

The Commission holds that it has exclusive jurisdiction over claims for damages arising from the misrouting of freight. (See Conference Rulings 139 and 214.)

The statute of limitations embodied in section 16 of the Act to Regulate Commerce, as embodied, governs misrouting claims, and thereunder the Commission is

without jurisdiction to take cognizance of claims presented more than two years after the delivery of shipments at destination.

If a connecting line accepts a shipment at the junction point without routing instructions, it will be held responsible for any excessive charges that may directly accrue from its error in forwarding the shipment to destination via any other than the cheapest available route. (Amending Conference Rulings 137 and 199.)

It is the duty of a carrier to make delivery in accordance with routing instructions. Where such routing instructions have not been followed and delivery is tendered at another terminal than that designated, it remains the duty of the delivering carrier to make delivery at the terminal designated in the routing instructions, either by a switching movement or by carting. In either event the additional cost to the delivering carrier must be paid in whole by the carrier guilty of misrouting. In case the carrier delivers to the designated terminal by wagon or dray, it must employ for such service facilities owned or contracted for by it and may not make an allowance to the shipper for such service. (Reaffirming Conference Ruling 283; see also Conference Ruling 392.)

The Commission will exercise jurisdiction to award damages as against the carrier guilty of the misrouting to the extent of the additional cost thus imposed on the delivering carrier.

The obligation lawfully rests upon the carrier's agent to refrain from executing a bill of lading which contains provisions that can not lawfully be complied with, or provisions which are contradictory and, therefore, impossible of execution.

When, therefore, the rate and the route are both given

by the shipper in the shipping instructions, and the rate given does not apply via the route designated, it is the duty of the carriers' agent to ascertain from the shipper whether the rate or the route given in the shipping instructions shall be followed. The carrier will be held responsible for any damages which may result from the failure of its agent to follow this course. (Modifying Conference Rulings 159, 186, 192, 214, affirming Conference Ruling 231; see also Conference Rulings 243 and 370.)

- I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 286, pars. (a), (b), (c), (d), (e) and (f).
Lathrop Lumber Co. vs. A. G. S. R. R. Co., 27 I. C. C. Rep. 250.
Newman Lumber Co. vs. Miss. C. R. R. Co., 26 I. C. C. Rep. 97.
Goodman Mfg. Co. vs. Penn. R. R. Co., 26 I. C. C. Rep. 423.
Henderson Lumber Co. vs. K. C. S. R. Co., et al., 16 I. C. C. Rep. 129.
Thatcher Mfg. Co. vs. N. Y. C. & H. R. R. R. Co., 16 I. C. C. Rep. 126.
Gus Momsen & Co. vs. Gila Valley, G. & N. Ry. Co., 14 I. C. C. Rep. 614.
Cedar Hill Coal Co. vs. Col. So. Ry. Co., 14 I. C. C. Rep. 606.
McCaull-Dinsmore Co. vs. C. G. W. Ry. Co., 14 I. C. C. Rep. 527.

The Commission will not recognize as a basis for reparation any rate that is not on file with it, except that in misrouting cases a lower state rate not on file here may be accepted as the basis for reparation when officially verified by the local authorities.

- I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 419, modifying Ruling No. 251.

See also:

- I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 25, 32, 83, 91, 93, 137, 140, 143, 159, 186, 190, 198, 199, 205, 214, 230, 231, 234, 253, 392, 433, 444.
Re Transportation of Company Material, 22 I. C. C. Rep. 439.

(9) Account of Overcharge on Shipment to Foreign Country Adjacent. An overcharge was collected on a

shipment of tobacco from a point in the United States to a destination in Mexico, and on application of the American carrier in which the Mexican lines refused to join, it was held that the American lines might refund such part of the total overcharge as their division of the through rate bore to the entire through rate.

I. C. C. Confr. Rulings Bull No. 6, Ruling No. 126.

§ 2. Claims for Reparation May be Amended.

Claims arising subsequently to the filing of the original complaint may be included by amendment.

L. V. R. R. Co. vs. American Hay Co., 219 Fed. Rep. 539.

See also:

Jubitz vs. So. Pac. Ry. Co., 27 I. C. C. Rep. 44.
Edmunds vs. I. C. R. R. Co., 80 Fed. Rep. 78.

Compare:

O'Brien Com. Co. vs. C. & N. W. Ry. Co., 20 I. C. C. Rep. 68.

§ 3. Interest Allowed on Awards of Reparation.

There is no provision in the Act to Regulate Commerce for interest on damages awarded by the Commission for violation of the provisions of the Act, but it is held that "full amount of damages" includes interest. It is the practice of the Commission to allow six per cent interest on awards of damages running from the time when the unlawful charges were collected or from the time the injury or damage was done.

Conference Ruling No. 464, being an amendment of Conference Ruling No. 379, reads as follows:—

"It is the view of the Commission that in the settlement of an overcharge claim (by which is meant the amount collected on a shipment in excess of the legally published rate) the claimant is entitled to in-

terest thereon at the rate of 6 per cent per annum from the date of the improper collection, except that in the settlement of an overcharge claim involving questions of weight or classification the claimant is entitled to interest thereon from the date of presentation of claim to carrier.

"The Commission does not regard it as unlawful for a claimant to accept in satisfaction of his claim the ascertained amount of an overcharge without interest; and the Commission is of the opinion that when such refund is made by the carrier within 30 days after the improper collection of the overcharge, or within 30 days after the presentation of claims involving questions of weight or classification, it may be regarded, in accordance with a well-established usage, as a cash transaction, upon which interest does not accrue.

"The views expressed in this ruling shall be understood as applying to all pending and unsettled overcharge claims and to those arising in the future, but not as authorizing or requiring the reopening of any claim which has been settled and closed by the acceptance by a claimant of the amount of an overcharge without interest."

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 464.
amending Ruling No. 379.

Denver & R. G. Ry. Co. vs. Baer Bros. Merc. Co., 209
Fed. Rep. 577, 580.

§ 4. Attorney's Fees in Connection with Reparation Awards.

The attorney's fee provided for under the terms of section 8, in connection with the damages therein contemplated, can only be recovered in a suit brought in a court of competent jurisdiction for a violation of the Act.

The Commission is without authority to award attorney's fees and the courts are not empowered to allow counsel's fees for the services of an attorney before the Commission.

The Commission follows the rule in **Joynes vs. Pennsylvania R. R. Co.**, 17 I. C. C. Rep. 361, and **Eichenberg vs. S. P. Co.**, 28 I. C. C. Rep. 584, that it cannot award reparation for damages such as attorney's fees, loss of time, court costs, or shipment values.

Thorne Neal & Co. vs. Wabash R. R. Co., 40 I. C. C. Rep. 88, 90.

Washer Grain Co. vs. Mo. Pac. Ry. Co., 15 I. C. C. Rep. 147.

§ 5. Consignor of f. o. b. Shipment Cannot Recover Damages.

When goods are sold f. o. b. (free on board) the point of origin, the title of the consignor passes upon the delivery of such goods to the carrier, and the carrier becomes the agent of the consignee in its acceptance of them. In the event of loss in connection with the transportation of the goods, the seller is not injured, for the loss or injury must be compensated for to the owner of the shipment.

Commercial Club of Omaha vs. A. & S. R. R. Co., 27 I. C. C. Rep. 302, 323.

Deming Lumber Co. vs. So. P. Ry. Co., 24 I. C. C. Rep. 598.

Lamb, McGregor & Co. vs. C. & N. W. Ry. Co., 22 I. C. C. Rep. 346.

Carolina Portland Cement Co. vs. C. & O. R. R. Co., 21 I. C. C. Rep. 533.

Baker Mfg. Co. vs. C. & N. W. Ry. Co., 21 I. C. C. Rep. 605.

Sunnyside Coal Min. Co. vs. D. & R. G. R. Co., 19 I. C. C. Rep. 20.

Nicola, Stone & Myers Co. vs. L. & N. R. R. Co., 14 I. C. C. Rep. 199, 208.

§ 6. Failure to Make Delivery not Ground for Award of Damages by Commission.

The Commission has approved written agreements stipulating the comprising and satisfying of claims for damages where it appeared to the satisfaction of the Commission that none of the provisions or terms of the

agreement or stipulation in so far as the same related to matters within the jurisdiction of the Commission, was inconsistent with any provision of law.

Joice & Co. vs. I. C. R. R. Co., 15 I. C. C. Rep. 239.
Goff-Kirby Coal Co. vs. Bessemer & Lake Erie R. R. Co.,
15 I. C. C. Rep. 553.

§ 7. Damages for Failure to "Plainly" State Rate.

It has been held by the Commission that a shipper is entitled to damages actually accruing because of the carrier's failure to state "plainly" the rate, in a case where the error in the tariff was such that the shipper's mistake in respect to the rates applicable to the shipment was one into which an intelligent person familiar with tariff construction might naturally be lead.

Larson Lumber Co. vs. G. N. Ry. Co., 21 I. C. C. Rep. 474, 475, 476.

§ 8. No Award of Damages for Breach of Contract.

Reparation based upon breach of contract for a privilege which was not published in the tariffs of the carrier must be denied the shipper because its allowance without publication would be in violation of the law.

An action for damages for breach of contract is beyond the jurisdiction of the Interstate Commerce Commission

McArthur Bros. vs. E. P. & S. W. Co., 34 I. C. C. Rep. 30, 31.
Shiel & Co. vs. I. C. R. R. Co., 12 I. C. C. Rep. 210, 211.

The Commission's function is not to enforce contracts, either specifically or by awards of damage for their breach, but only to award damages to parties complainant entitled to damages on account of violations of the Act to Regulate Commerce. The courts are the proper tribunal, even though the interpretation of the contract involves the question of a possible violation of the provi-

sions of the Act against rebating. Since only the courts are empowered to enforce these provisions, any expression by the Commission would be entirely gratuitous and binding on no one.

Eddleman vs. Midland Valley R. R. Co., 13 I. C. C. Rep. 103.

§ 9. Award of Damages for Misquoting Rate.

Under the provisions of section 8, of the Act to Regulate Commerce the shipper is given the right to recover damages for any violation of the Act. Manifestly a misquotation of rate in response to the shipper's written request therefor is a violation of the Act that he may recover for in a proper action in court of competent jurisdiction.

Since the amendment to the Act of 1910, the carrier is not only penalized for misquoting a rate,—this penalty inuring to the Government and not to the shipper or injured person as damages—but it is declared by the statute that it is illegal to misstate a rate.

Prior to the amendment of 1910 if a carrier misstated its rate and quoted a wrong rate, the shipper was (as he is now) required to pay the legally published rate, even though the shipper was injured thereby. And for such loss the shipper had no remedy.

T. & P. Ry. Co. vs. Mugg, 202 U. S. 242, 50 L. Ed. 1011.

G. C. & S. F. R. R. Co. vs. Hefley, 158 U. S. 98, 39 L. Ed. 910.

See also:

Annual Report of Interstate Commerce Commission for 1908
(22nd), pp 16, 17.

12 I. C. C. Rep. 418, 421, 422; 7 I. C. C. Rep. 255, 278.

And this view of the law was conformed to by both the federal and state courts in many instances.

The practical hardship of the law was called to the atten-

tion of Congress in the 22nd Annual Report of the Interstate Commerce Commission.

The amendment of 1910 prescribed a penalty for misquoting a rate under certain prescribed conditions, to-wit:—upon written request by a shipper for a written statement of the rate or charge applicable to a described shipment between stated points—and made it illegal to misstate a rate. In connection with the provisions of section 8 of the Act to Regulate Commerce, as amended, this provision now presents a situation in which the violation of the provisions of the Act affords the shipper a right to recover for his damages.

Act to Regulate Commerce, sec. 6.
St. L. S. W. Ry. Co. vs. Lewellen Bros., 192 Fed. Rep. 540.

This interpretation of the law, as it now stands, is not in conflict with either the Henderson Elevator case nor the Albers Commission Company case, since each of these cases relates to the statute as it was worded prior to the 1910 amendment.

See:

I. C. R. R. Co. vs. Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290.
K. C. S. Ry. Co. vs. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556.

And it must be borne in mind that so far as the jurisdiction of the Interstate Commerce Commission is concerned, it still remains without authority to award reparation for the misquotation of a rate. The right of action in the shipper to recover for loss sustained through the misquotation of a rate must be exercised in a court of competent jurisdiction.

Obear-Nester Glass Co. vs. M. P. Ry. Co., 41 I. C. C. Rep. 446, 447.
Utah Wholesale Grocery Co. vs. N. & W. Ry. Co., 39 I. C. C. Rep. 345, 346.

Compare:

Franke Grain Co. vs. I. C. R. R. Co., 27 I. C. C. Rep. 625, in harmony with the view that damages may be recovered since the 1910 amendment of the Act.

§ 10. Award of Damages by Commission Prima Facie Proof of Right to Recover.

In the event suit is brought in a court of competent jurisdiction for the recovery of damages resulting from the violation of the provisions of the Act to Regulate Commerce, such a suit should proceed in all respects like other civil suits for damages, except that upon the trial thereof, the findings and order of the Commission shall be **prima facie** evidence of the facts therein stated, including the right of the damaged party to recover.

Section 16, Act to Regulate Commerce.

§ 11. Award of Damages May Be for Profits Lost.

While reparation is not measured by the probability of profit, profits may be recovered for discrimination.

Eaton vs. C. H. & D. Ry. Co., 11 I. C. C. Rep. 619, 626.

§ 12. Protest not Condition Precedent to Recovery of Damages for Unreasonable Rate.

No protest by the shipper against the payment of an unreasonable rate need be made as a condition precedent to recovery of damages on account thereof. Such a protest could have no force, since the rates are fixed by the tariff and the carrier could not yield to the protest by charging less than the tariff rate.

Baer Bros. Merc. Co. vs. D. & R. G. Ry. Co., 233 U. S. 479.
Kindson-Ferguson Fruit Co. vs. C. St. P. M. & O. Ry. Co., 204 U. S. 670. (Same 149 Fed. Rep. 973.)

See also:

Penn. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446.

§ 13. Reparation Awarded Account Accident of Billing.

Through inadvertence the words "for export" were omitted from the bill of lading. The Commission, in disposing of the matter, said:

"It is well settled that the character of a shipment and not the accidents of billing determine its nature, and the evidence shows clearly that the shipment was an export shipment from the outset. The rate legally applicable therefor was the export rate of 18 cents" instead of the domestic rate of 40 cents.

Kirk vs. M. K. & T. Ry. Co., 39 I. C. C. Rep. 755, 756.

CHAPTER XII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 10.

- § 1. Statutory Provisions.
- § 2. Amendments to the Section.
- § 3. Penalties Provided by Section 10.
- § 4. Joint Liability for Damages for Inducing Discrimination.
- § 5. "False Billing" or "Misrepresentation;" When Offense Is Complete.
- § 6. Limitation of Criminal Prosecutions Under Section 10.
- § 7. Constitutionality of Section 10.
- § 8. Purpose of the Section.

CHAPTER XII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 10.

§ 1. Statutory Provisions.

("As amended March 2, 1889, and June 18, 1910.)

That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: **Provided**, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in

Penalties for violations of Act by carriers, or when the carrier is a corporation, its officers, agents, or employees: Fine and imprisonment.

rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court in the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

"Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then estab-

Penalties for false billing, etc., by carriers, their officers or agents: Fine and imprisonment.

Penalties for false billing, etc., by shippers and other persons: Fine and imprisonment.

lished and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: **Provided**, That the penalty of imprisonment shall not apply to artificial persons.

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty

Penalties for inducing common carriers to discriminate unjustly: Fine and Imprisonment. Joint liability with carrier for damages.

of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

§ 2. Amendments to the Section.

As originally passed section 10 of the Act contained only the general penalty clause in the first paragraph. The remainder of the penalties now appearing in the section were added in the amendment of March 2, 1889. In the amendment to the section of June 18, 1910, corporations were included, and made subject to the restored penalties by imprisonment which had been added by the amendment of June 29, 1906.

The effect of the Elkins Act of 1903, was to remove from the Act all penalties of imprisonment, providing for the imposition of fines in lieu thereof. By the amendment of June 29, 1906, penalties by imprisonment were restored.

§ 3. Penalties Provided by Section 10.

Penalties of a severer nature are provided for in section 10 for each of the offenses defined therein.

The penalty for conviction of the general offense of willfully doing or causing to be done, or willingly suffering or permitting to be done, or aiding or abetting in the com-

mission of the offense of violating any of the provisions of the Act to Regulate Commerce or failing to do any of things required by it, is a fine of not exceeding five thousand dollars for each offense, and where the offense for which any person is convicted is an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person is liable, in addition to the fine above provided for, to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine or imprisonment, in the discretion of the court.

The penalty for misrepresentation of shipments by shippers is a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense, and the same penalty for each offense is provided for the conviction of a common carrier, any officer or agent thereof, or any person acting for or employed by such common carrier, when such common carrier is a corporation. In the third paragraph of section 10 it is provided that the penalty of imprisonment shall not apply to artificial persons.

The penalty provided for inducing or aiding or abetting a common carrier subject to the provisions of the Act in unjustly discriminating in favor of one shipper as against any other consignor or consignee in the transportation of property, is a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense. In addition to this latter criminal penalty, it is provided that "such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be

brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

§ 4. Joint Liability for Damages for Inducing Discrimination.

The section specifically provides that any person, corporation, or company who shall be guilty of inducing a common carrier subject to the Act to unjustly discriminate against any other shipper shall be held jointly and severally liable with such common carrier for all damages resulting from such discrimination, and action to recover such damages may be maintained in any court of the United States of competent jurisdiction by the person damaged.

§ 5. "False Billing" or "Misrepresentation;" When Offense is Complete.

The offense of "false billing," "misrepresentation of shipment," "false classification," or "any device," for procuring less than lawfully established charges for transportation, is complete just as soon as the contract or arrangement for the illegal rate is consummated. It is not necessary that the shipment should actually be transported where its transportation has been arranged for at a lesser rate than the published tariff rate by means of misrepresentation, such as false billing, false classification, etc. Thus, where an indictment against a shipper under section 10 of the Act, obtaining by misrepresentation a rate on salt less than the published rate sets out the shipping order which describes the article as coarse salt, weight 63,000 lbs., and

specifies the rate as 10c, whereas the article was in fact coarse salt in sacks and the legal rate is 14c, and the indictment further sets out the legal tariff, it contains a sufficiently detailed statement of the misrepresentation relied upon; and it was held in this case that in an indictment against a shipper under section 10 of the Act for obtaining by misrepresentation of the commodity a rate less than the published rate, it is sufficient, having in view section 1025 of the Revised Statutes relating to defects of form, to charge defendants with the commission of the offense, a misdemeanor, in the words of the statute; the essential elements of the offense being set forth with sufficient definiteness to apprise the defendants of the particular nature of the charge against them. And the fact that a shipper intentionally suppressed a material statement necessary to the transportation was a misrepresentation sufficient to sustain a conviction.

U. S. vs. Sterling Salt Co., 200 Fed. Rep. 593, 595, 596, 597.

§ 6. Limitation of Criminal Prosecutions Under Section 10.

No limitation is contained in the section within which criminal prosecutions must be instituted against offending parties. As an offense against the Act is an offense against the United States, the statutes of the United States governing limitations of criminal proceedings prevail. Prosecutions for offenses, under the Act, must be brought within three years, and proceedings for penalties and forfeitures must be brought within five years, after the commission of the offense or wrong.

Rev. Stats. U. S., sec. 1044.

Rev. Stats. U. S., sec. 1047.

§7. Constitutionality of Section 10.

The constitutionality of section 10 of the Act to Regulate Commerce as against corporations was established by the Supreme Court in **N. Y. C. & H. R. R. Co. vs. U. S.**, 212 U. S. 481, 492, 53 L. Ed. 613.

In **U. S. vs. Adams Express Co.**, 229 U. S. 381, 57 L. Ed. 1237, the Supreme Court said:

"It is true that a doubt was raised by the wording of section 10 in the original Act, whether corporations were indictable under it. This doubt was met by the Act of February 19, 1903 (the Elkins Act). We do not perceive that any inference can be drawn from this source in favor of a construction of the later amendment other than that that we deem the natural one. The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established, **New York Central and Hudson River R. R. Co. vs. United States**, 212 U. S. 481, 492, 53 L. Ed. 613, 29 Sup. Ct. 304, and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it by the company name.

See also.

Wells Fargo & Co. vs. Neiman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600.

§ 8. Purpose of the Section.

Section 10 places the same obligation upon the shipper as upon the carrier to observe lawful tariff provisions. Any willfully false representation of the contents of a package on the part of the shipper or carrier is prohibited, denominated as a fraud, and declared to be a misdemeanor

by the Act, and the shipper or carrier convicted thereof is subjected to fine or imprisonment, or both, in the discretion of the court.

The section is broadly drawn and its objective is the prohibition of transportation for less than the published rates obtained by means of willful false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement or by any other device or means, whether with or without the consent or connivance of the carrier. The prohibition is extended to anyone who shall knowingly and willfully directly or indirectly, himself or by employee, agent, officer or otherwise by false statement or representation as to cost, value, nature or extent of injury or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious or fraudulent statement or entry, obtains or attempts to obtain any allowance, refund or repayment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall be less than the lawfully published and established rates. These acts and omissions are declared to be misdemeanors and, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, are subject to either fine and imprisonment or both, in the discretion of the court.

The filing of fraudulent claims for loss or damage was

first made an offense by the amendments of 1910 to section 10 of the Act to Regulate Commerce.

In its annual report for 1915, the Interstate Commerce Commission, referring to false billing and fraudulent claims, said:

"False billing of shipments by shippers has continued to require much attention. A large number of prosecutions for misdescription of the contents of shipments and for understatement of the weights by shippers for the purpose of defeating the lawful rates have been instituted in widely scattered sections of the country. As to certain commodities and in certain lines of business a custom of misbilling is sometimes so general that several shippers whose reputations otherwise may be excellent have seemed to deem it proper to defeat the plain requirements of the Act. For example, in the hardware business several firms in different sections of the country, in spite of a classification rule requiring that less than carload packages containing different articles should take the rate applicable to the highest rated article, have persisted in including small quantities of high-rated articles in such packages, while describing the package as containing only articles of lower rating. Some indictments based on this practice have already been returned. The law requires the most rigid observance of the published tariffs and classification not only by carriers but by shippers. * * *

"In misbilling cases it is common for shippers to plead guilty, and thus escape with a smaller fine than would result if the case were contested. The courts, however, have recently imposed substantial fines in cases of this kind where the defendant admits his guilt. * * *

"A large number of shippers also have been prosecuted for filing with the carriers false claims for loss and damage. This practice has been most prevalent in the case of shippers of perishable articles who upon

suffering damage frequently file excessive claims against the responsible carrier. * * *

"Several prosecutions have also been instituted against shippers who represented that their property had been damaged when no damage, in fact, occurred or who filed claims based upon alleged loss when, in fact, the property had been duly received.
* * *

"While prosecutions arising from this practice during the past year have been against shippers only, there have been evidences that the laxness of the carriers in recognizing and paying such false claims amounts, in effect, to the granting of rebates from the lawful rates. Evidence of this kind, tending to show that carriers as well as shippers are responsible for the filing and payment of excessive damage claims, is now under review.

CHAPTER XIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 11 AND 24.

- § 1. Statutory Provisions of Section 11.
- § 2. Statutory Provisions of Section 24.
- § 3. Functions and Organization of Interstate Commerce Commission.

CHAPTER XIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 11 AND 24.

§ 1. Statutory Provisions of Section 11.

"That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domino, eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No

Interstate Commerce Commissioners—method of appointment and terms.

vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission."

§ 2. Statutory Provisions of Section 24.

(Added June 29, 1906.) "That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners shall be appointed from the same political party." shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full terms of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party."

Commission to
consist of sev-
en members;
terms; salary.

Qualification of
Commissioners

§ 3. Functions and Organization of Interstate Commerce Commission.

For description of the administrative functions and departmental organization of the Interstate Commerce Commission, see "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," *post*.

CHAPTER XIV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 12.

§ 1. Statutory Provisions.

§ 2. Reference Section.

CHAPTER XIV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 12.

§ 1. Statutory Provisions.

(As amended March 2, 1889, and February 10, 1891). "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have the power to require, by subpoena, the attendance and testimony of wit-

Commission to inquire into business of carriers and keep itself informed in regard thereto.

Commission to execute and enforce provisions of this Act.

District attorneys to prosecute under direction of Attorney General.

Commission may require testimony and documentary evidence.

nesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a cir-

Courts to compel witnesses to attend and testify.

Claim that testimony or evidence will tend to criminate will not excuse witness.

Depositions.

Commission may order testimony to be taken by deposition.

cuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

When witness is
in a
foreign
country.

"Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States."

Fees of witnesses
and
magi-
strates.

§ 2. Reference Section.

As the provisions of section 12 of the Act to Regulate Commerce relate to the attendance and testimony of witnesses in investigations and hearings before the Interstate Commerce Commission, the amplification of the section will be found in Part IV, "Interstate Commerce Law," under "Practice and Procedure Before the Interstate Commerce Commission," **post**.

CHAPTER XV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 13.

- § 1. Statutory Provisions.
- § 2. Amendment of the Section.
- § 3. Purpose of the Section.

CHAPTER XV.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 13.

§ 1. Statutory Provisions.

(As amended June 18, 1910). "That any person, firm, corporation, company, or association, or any mercantile agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Complaints to
Commission.
How and by
whom made.
How served.

Commission to
have discretion
as to manner of
investigation.

"Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Commission may
issue orders in
investigations
begun on its
own motion.

Complainant's
interest im-
material.

§ 2. Amendment of the Section.

Prior to the amendment of section 13 by the Act of June 18, 1910, it provided for complaints only by shippers or their agents or representatives. Since its amendment it authorizes common carriers to bring complaints before the Commission and specifically declares the powers which the Commission may exercise in instituting, upon its own motion, inquiries and investigations, such powers and authority having the same force and effect as if proceedings were formally brought before the Commission by complaint or petition. The Commission is also given power to make or enforce any order or orders in a case,

or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

§ 3. Purpose of the Section.

The provisions of section 13 relate to matters of procedure before the Interstate Commerce Commission and amplification of the section will, therefore, be found in Part IV, "Interstate Commerce Law," under "Practice and Procedure Before the Interstate Commerce Commission," *post*.

CHAPTER XVI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 14.

- § 1. Statutory Provisions.
- § 2. Evidentiary Value of Findings of Commission.
- § 3. Decisions and Reports of Interstate Commerce Commission.

CHAPTER XVI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 14.

§ 1. Statutory Provisions.

(Amended March 2, 1889, and June 29, 1906).

"That wherever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Commission must report, stating its conclusions and order.

Reparation.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Reports must be entered of record. Service of copies on parties.

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof of authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

Reports and decisions to be published, and be competent as evidence.

Annual reports of Commission.

§ 2. Evidentiary Value of Findings of Commission.

See Part IV, "Interstate Commerce Law,"—"Practice and Procedure Before the Interstate Commerce Commission," *post*.

§ 3. Decisions and Reports of Interstate Commerce Commission.

See Part IV, "Interstate Commerce Law,"—"Publications and Reports of the Commission," *post*.

CHAPTER XVII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 15.

- § 1. Statutory Provisions.
- § 2. Amendments to the Section.
- § 3. Subjective Analysis of Section 15.
- § 4. Constitutionality of Section.
- § 5. Through Routes.
- § 6. Right of Shipper to Select Through Route.
- § 7. Power of Suspension Vested in Interstate Commerce Commission.
- § 8. Allowances to Shippers for Services or Instrumentalities Furnished in the Transportation of Their Shipments.
- § 9. Nature of Interstate Commerce Commission under Its Enlarged Powers, and the Relation of Section 15 to the Entire Act to Regulate Commerce.
- § 10. Taking Effect and Duration of Commission's Orders.
 - (1) Statute of Limitations.

CHAPTER XVII.

ACT TO REGULATE COMMERCE AS AMENDED.

(Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 15.

§ 1. Statutory Provisions.

(As amended June 29, 1906, and June 18, 1910).

"That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification,

Commission may determine and prescribe just and reasonable rates and classifications to be observed as maximum charges.

Commission may determine and prescribe just and reasonable regulations or practices. Commission may order carriers to cease and desist from violations found. Orders of the Commission effective as prescribed, but in not less than thirty days.

regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such a period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof of the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and

Orders in force not exceeding two years, unless suspended or set aside by Commission or court.

When carriers fail to agree on divisions of joint rate, Commission may prescribe proportion of such rate to be received by each carrier.

Investigation of new schedules.

decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: **Provided**, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

"The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily

Commission may suspend new schedules.

Commission may extend suspension.

Burden of proof on carrier as to reasonableness of increased rates.

Commission may establish through routes and joint rates and classifications.

such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

Limitation on
power to pre-
scribe through
routes.

"And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Shippers may
designate routing.

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial

carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: **Provided, however,** That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

"It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: **Provided,** That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory in the exercise of his powers, or to any officer or other duly authorized person

Unlawful to give or receive information relative to shipments.

Exceptions.

seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Penalty.

"Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

Commission may determine reasonable maximum to be paid for service rendered or instrumentality furnished by owner of property transported.

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Enumeration of powers in this section not exclusive.

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."⁽¹⁾

§ 2. Amendments to the Section.

The fifteenth section of the Act to Regulate Commerce has been more radically amended than any other section of the Act. Prior to the amendment of June 29, 1906,

⁽¹⁾ For amendment of August 6, 1917, providing that until Jan. 1, 1920, no increased rate shall be filed except after approval by Commission, see Appendix, I. C. Law, Part IV.—"Amendatory Acts."

the section merely provided that the Commission, having found that there had been some violation of the provisions of the Act, should serve notice upon the carrier to desist from the wrongful act or practice. At that time the Commission was without power to prescribe either direct or indirect minimum, maximum, or absolute rates, but, under other sections of the Act, could order the carrier to desist from further enforcement of an unreasonable rate or an unjust or discriminatory rate or practice.

Section 15 as it now stands is practically a new section added to the Act after the Commission had determined the violation had occurred. In the event of further continuance of such violation by the carrier, the notice served as the condition precedent or basis for proceedings in court to enforce the order of the Commission. In the present section this notice is omitted, since in all cases, except where orders for the payment of money are made, no court proceedings are necessary to enforce the orders of the Commission.

Amendment of June 29, 1906:

Authorized the Commission to establish joint rates and classifications, fix reasonable rates for the future and establish through routes.

Amendment of June 18, 1910:

Commission was authorized to investigate any rate increase, and to suspend the taking effect of such increased rate, pending an investigation by the Commission in which the burden is upon the carrier to show the reasonableness of the proposed rate;

To establish through routes and joint rates and classification without limitation. The amendment of 1906 in empowering the Commission to establish through routes, restricted such authority with the proviso that "no reasonable or satisfactory through route exists."

Commission was also authorized to determine a just and reasonable allowance to a shipper for any service rendered or instrumentality furnished by him in the transportation of his property.

Making it unlawful for a carrier to give information concerning rival shipments.

Permitting the shipper to select the route of his shipment. This has reference, of course, to through shipments.

§ 3. Subjective Analysis of Section 15.

As now amended the provisions of section 15 of the Act relate to the following subjects:

- (1) Commission may determine and prescribe just and reasonable rates and classifications to be observed as basis for maximum charges.
- (2) Commission may determine and prescribe just and reasonable regulations or practices.
- (3) Commission may order carriers to desist and cease from full extent of violations found.
- (4) Orders of Commission effective as prescribed, but in not less than thirty days.
- (5) Orders shall continue in force not exceeding two years unless suspended or set aside by Commission or court.
- (6) When carriers fail to agree on divisions of joint rate, Commission may prescribe proportion of such rate to be received by each carrier.
- (7) Investigation by Commission of new schedules.

- (8) Commission has authority to suspend new schedule when found to be apparently unreasonable or discriminatory.
- (9) Commission may extend such suspension period.
- (10) Burden of proof on carrier as to reasonableness of increased rates.
- (11) Commission may establish through routes and joint rates and classifications.
- (12) Limitation imposed on through route power.
- (13) Selection of route by shipper permitted.
- (14) Unlawful to give or receive information relative to rival's shipments.
- (15) Commission may determine just and reasonable charges or allowance for service rendered by owner of property transported or for any instrumentality furnished by such owner and used in such transportation.

§ 4. Constitutionality of Section.

By far the most important power conferred upon the Commission by the reconstruction of the fifteenth section in the 1906 amendment was the vesting of authority in the Commission to fix maximum rates for the future. While, under the statute, the carrier still retains the primary right to make rates, the amended fifteenth section of the Act invests the Commission with the legislative function of prescribing rates to be observed by carriers in the future. The right of the Commission to thus prescribe rates, however, depends upon the unreasonableness of the existing or proposed rate, and unless there is evidence to indicate that such rate is unreasonable the Commission is without jurisdiction to make an order.

The constitutionality of this provision of the amended fifteenth section has been upheld by the Supreme Court as a proper delegation by Congress of legislative as well

as administrative powers to the Commission. While the Commission may exercise this legislative function fully and freely, subject only to such limitations as Congress may impose, it may not enter an order under the statute until the carrier is afforded a hearing, whether the investigation is proceeding upon a complaint filed or is undertaken upon the initiative of the Commission itself. A finding by the Commission without hearing and an opportunity to all parties concerned to introduce evidence would be arbitrary and baseless. The Commission is primarily an administrative body and while not limited by strict rules of procedure as to the admissibility of evidence, etc., it cannot conduct *ex parte* proceedings, but must fully inform all parties of the evidence to be submitted or to be considered, giving each an opportunity to cross-examine witnesses, inspect documents, and offer in evidence explanatory or rebuttal facts.

The Supreme Court, in *I. C. C. vs. L. & N. R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, referring to the investiture of the Commission with this extraordinary power, said:

“But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government’s contention is correct it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be in-

juriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

* * *

"Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Interstate Commerce Commission vs. Northern Pacific Railway*, 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417. In a case like the present the courts will not review the Commission's conclusions of fact (*Interstate Commerce Commission vs. Delaware, etc., Ry.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551.

"The Government further insists that the Commerce Act requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of section 12 may be used as basis for

instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Commission vs. Baird*, 194 U. S. 48 L. Ed. 860, 24 Sup. Ct. 563. But the more liberal the practise in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *Interstate Commerce Commission vs. Baltimore, etc., R. R.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5."

The Federal Court, in *L. & N. R. R. Co. vs. I. C. C.*, 184 Fed. Rep. 118, held that the power in the Commission to fix rates for the future was purely legislative, within the power of Congress to grant, and exercisable by the Commission to the same extent that Congress might exercise it, unless limitation of such power by the Commission was imposed by Congress in its delegation of the authority to the Commission. The amendment was,

therefore, held to be in things relating to the fixing of rates, constitutional.

Among the important provisions included in the amended fifteenth section was that vesting power in the Commission to regulate "any regulation or practice whatsoever" affecting rates or violative of any of the provisions of the Act.

Operative effect is given to the orders of the Commission, without the sanction of previous judicial authority, empowering that body to correct unreasonable rates as well as practices found upon complaint to be unduly prejudicial and unjustly discriminatory, such order having effect within the period fixed in the statute and for the enforcement of which penalties are provided.

In the **Pitcairn Coal Company** case the Supreme Court upheld this authority in the Commission as being a proper exercise of the power of Congress in curing the former remedial inefficiency of the Act to Regulate Commerce which had failed to supply efficient means for giving effect to the orders of the Commission, saying:

"Now it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the Act by supplying efficient means for giving effect to the orders of the Commission, made in the exertion of the authority conferred upon that body. To that end one of the amendments, section 15, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the

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period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided.

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292.

See also:

I. C. C. vs. I. C. R. R. Co., 215 U. S. 452, 54 L. Ed. 280.

Compare:

Supreme Court's interpretation of section 15 prior to the 1906 amendment.

I. C. C. vs. C. N. O. & T. P. Ry. Co., 167 U. S. 479, 42 L. Ed. 243.

C. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184, 40 L. Ed. 935.

I. C. C. vs. B. & O. R. R. Co., 145 U. S. 263, 36 L. Ed. 699.

See also:

The following decisions of the Supreme Court relative to the powers vested in and the control exercised by the Commission under section 15.

Allowances:

A. T. & S. F. vs. U. S. 232 U. S. 199, 58 L. Ed. 568.

U. S. vs. B. & O. R. R. Co., 231 U. S. 274, 58 L. Ed. 218.

I. C. C. vs. Dittenbaugh, 222 U. S. 42, 56 L. Ed. 83.

U. P. R. R. Co. vs. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171.

Regulation of Rates:

I. C. C. vs. C. R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946.

I. C. C. vs. D. G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306.

Discriminations in Facilities:

I. C. C. vs. A. T. & S. F. Ry. Co. (Los Angeles Switching Case), 234 U. S. 294, 58 L. Ed. 1319.

S. P. Term. Co. vs. I. C. C., 219 U. S. 498, 55 L. Ed. 310.

Regulation of Cars:

Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S. 304, 57 L. Ed. 1494.

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292.

- I. C. C. vs. I. C. R. R. Co., 215 U. S. 452, 54 L. Ed. 280.
P. Co. vs. U. S., 236 U. S. 351, 59 L. Ed. (Decided Feb. 23, 1915.)
I. C. C. vs. P. R. R. Co., — U. S. —, — L. Ed. —. (Decided Dec. 11, 1916, Nos. 340 and 341, Oct. Term.)

§ 5. Through Routes.

The power of the Commission to require through routes is not unlimited. The Commission cannot compel a carrier, without its consent, to include in a through route so established substantially less than its entire line of railroad.

Under the amendment of 1906, which contained the qualifying clause when "no reasonable or satisfactory through route exists," rendered the action of the Commission in establishing a through route subject to review by the courts. With the removal of this exception in the amendment of 1910, the Commission was empowered to establish through routes, either upon complaint or upon its own motion, where the carriers had failed or refused to voluntarily establish such through routes, even though one of such carriers might be a water line.

- I. C. C. vs. N. P. R. Co., 216 U. S. 538, 54 L. Ed. 608. (Reviewing order of Commission in 16 I. C. C. Rep. 300.)

In the case of **C. & C. Tract. Co. vs. B. & O. S. W. R. Co.**, 20 I. C. C. Rep. 486, 490; the Commission said:

"When the complaint was filed the Commission, under section 15, had authority after hearing on a complaint, to establish through routes and maximum joint rates and to prescribe the divisions thereof, "provided no reasonable or satisfactory through route existed. In the amendment of June 18, 1910, this limitation was omitted. As the section now reads, the only limitations on our authority to establish through routes and joint rates need be mentioned here are:

“(a) We may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the termini of the proposed through route.

“(b) We may not establish through routes and joint rates between a steam railroad and a street electric passenger railway that does not transport freight in addition to its passenger and express business.

“The first of these limitations must, of course, be observed in all cases; the second has no application in connection with this complaint.

“This is the first occasion upon a formal complaint that we have had to examine the amended provision. But one point that seems to be entirely clear is that, although the complaint was filed before the amendment became effective, we can act only under the authority that we now have. We gather also from a careful reading of the amended clause that it was the purpose of the Congress to widen the scope of our powers to establish through routes and joint rates rather than to narrow them, and to leave in the Commission full discretion to act in such cases in the light of all the facts and circumstances and according to what may seem wise, fair, reasonable and equitable in each case.

Upon review of this case by the Supreme Court it held that the power of the Commission does not extend to ordering switch connections wherever it sees fit but is limited to a certain class of lines among which are those dependent upon and incident to the main line, feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment, and does not apply to independent roads parallel to or competing with steam roads and working on a different plan.

See also:

- The Ogden Gateways Case, 35 I. C. C. Rep. 131, 139.
Rates on Lumber from Southern Points, 34 I. C. C. Rep. 652, 707.
City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 86.
Jurisdiction over Urban Electric Lines, 33 I. C. C. Rep. 536, 539.
Corp. Comm. of Oklahoma vs. K. C. M. & O. Ry. Co., 32 I. C. C. Rep. 384, 385.
Decatur Nav. Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281, 287.
Switching at Galesburg, Ill., 31 I. C. C. Rep. 294, 296, 297.
Pacific Nav. Co. vs. S. P. Co., 31 I. C. C. Rep. 472, 476, 478, 479.
Merchants & Mfrs. Assn. vs. C. R. R. of N. J., 30 I. C. C. Rep. 396, 401.
Cement Rates from Mason City, 30 I. C. C. Rep. 426, 430.
Lumber Rates from Oregon and Washington, 29 I. C. C. Rep. 609, 617, 618.
Concentration of Cotton at Points in Arkansas, 29 I. C. C. Rep. 106, 108.
Wichita Board of Trade vs. A. & S. Ry. Co., 29 I. C. C. Rep. 376, 379.
Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 108.
Rates on Cottonseed and Its Products, 28 I. C. C. Rep. 219, 221.
People's Fuel & Supply Co. vs. G. T. W. Ry. Co., 27 I. C. C. Rep. 24, 28.
Truckers' Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.
Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 414.
Wichita Falls System, Joint Rate Cases, 26 I. C. C. Rep. 215, 222.
Augusta & Savannah Steamboat Co. vs. O. S. S. Co., 26 I. C. C. Rep. 380, 384.
Texas Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 508, 510.
Kansas City, Mo., & Kansas City, Kansas, vs. K. C. T. Co., 24 I. C. C. Rep. 22, 26.
Chamber of Commerce of New York vs. N. Y. C. & H. R. R. Co., 24 I. C. C. Rep. 55.
Commercial Club of Superior, Wis., vs. G. N. Ry. Co., 24 I. C. C. Rep. 96, 112.
Flour S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 185.
Corp. Comm. of Oklahoma vs. A. T. & S. F. Ry. Co., 23 I. C. C. Rep. 656.
In re Investigation of Alleged Unreasonable Rates on Meats, 23 I. C. C. Rep. 652, 655.
Missouri & Illinois Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39, 49.

- Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 21 I. C. C. Rep. 304, 312, 313.
 C. & C. Traction Co. vs. B. & O. S. W. R. R. Co., 20 I. C. C. Rep. 486, 490.
 Baer Bros. Mercantile Co. vs. D. & R. G. R. R. Co., 200 Fed. Rep. 614, 620.
 B. & O. S. W. R. R. Co. vs. I. C. C., 195 Fed. Rep. 962.
 I. C. C. vs. L. & N. R. R. Co., 227 U. S. 88, 57 L. Ed. 431.
 U. S. vs. P. & A. R. & N. Co., 228 U. S. 87, 57 L. Ed. 742.
 So. Pac. Co. vs. I. C. C., 200 U. S. 536, 50 L. Ed. 585.
 I. C. C. vs. I. C. R. R. Co., 215 U. S. 452, 54 L. Ed. 280.

§ 6. Right of Shipper to Select Through Route.

The shipper is given the right under section 15 to select the route via which he desires his shipment to move and designate the same in writing upon the bill of lading, when there are two or more through routes available, and the initial carrier and all connecting carriers are under the express duty of transporting the shipment in accordance with the shipper's selection and direction of his route.

§ 7. Power of Suspension Vested in Interstate Commerce Commission.

The power of the Commission to suspend proposed increased rates has been exercised with important effect since the amendment of the section in 1910. The most important instances were the attempted advances by the eastern and western lines in 1910, and in 1915, known as the Advance Rate Cases—Western Cases and Eastern Cases. In the 1910 Eastern Case the Commission, after suspending the tariffs, denied the increases proposed on the ground that the burden was upon the carriers to show the reasonableness of and necessity for the proposed increases and that there was no evidence produced before the Commission establishing the necessity for higher rates. The Commission said:

"Before any general advance in rates can be per-

mitted it must appear with reasonable certainty that carriers have exercised proper economy in the purchase of their supplies, in the payment of wages, and in the general conduct of their business."

Re Advances in Rates—Eastern Case, 20 I. C. C. Rep. 243.

In the Western Case the Commission said that the carriers seeking to increase their rates must satisfy the mind of the Commission of the fact that such proposed rates were reasonable and just.

Re Advances in Rates—Western Case, 20 I. C. C. Rep. 307.

The Commission is empowered to suspend a proposed rate 120 days in the first instance, pending its investigation of the necessity for and the reasonableness of the proposed rate, and pending such suspension if the investigation of the Commission cannot be concluded within the period, a further extension of the suspension period may be made not to exceed six months.

Since the amendments to the Act of 1906 the Commission has repeatedly held that transit is a practice or regulation included within the provisions of section 15, over which the Commission has jurisdiction. In *Spiegle vs. S. Ry. Co.*, 25 I. C. C. Rep. 71, 73, the Commission said:

"The defendant suggests that we have no jurisdiction to deal with this question, and in confirmation of this view refers to several of our decisions. It is true that the Commission held, previous to the Hepburn amendment of 1906, that the privilege of milling in transit was one which the carrier might or might not accord, at its option, provided no discrimination was effected, and several expressions can be found in the opinions of the Commission subsequent to 1906 which indicate the same view after the passage of that amendment. But it was finally held in a recent case that transit in its various forms was a reg-

ulation or practice affecting the rate of which this Commission had jurisdiction, and under that holding it is competent for us to inquire whether this charge is excessive."

When the Commission suspends the operation of a tariff it is contemplated that the rates sought to be increased or otherwise changed are to be continued in effect pending the investigation.

Under section 15 the Commission is authorized, when new rates are filed to determine on its own initiative the propriety of such new rates and pending such determination, to suspend the operation of the schedule stating such new rates, but it is the custom of the Commission to suspend new rates when it appears that they will create unlawful discrimination.

Western Rate Advance Case, 35 I. C. C. Rep. 497.

Class Rates Between Stations in Louisiana, 33 I. C. C. Rep. 302, 303.

Five Per Cent Case, 32 I. C. C. Rep. 325.

Five Per Cent Case, 31 I. C. C. Rep. 351.

Rates on Boots and Shoes from Boston, 31 I. C. C. Rep. 154, 155.

Wickwire Steel Co. vs. N. Y. C. & H. R. R. R. Co., 30 I. C. C. Rep. 415, 420.

Coal Rates from Oak Hills, Colo., 30 I. C. C. Rep. 505, 508.

Fabrication-in-Transit Charges, 29 I. C. C. Rep. 70, 78.

Commodity Rates Between Missouri River Points, 28 I. C. C. Rep. 265, 267.

In re Rates on Plaster and Gypsum Rock, 27 I. C. C. Rep. 67, 70.

New England Investigation, 27 I. C. C. Rep. 560, 614.

Protection of Potato Shipments in Winter, 26 I. C. C. Rep. 681, 683.

Commutation Rate Case, 21 I. C. C. Rep. 428, 429.

§ 8. Allowances to Shippers for Services or Instrumentalities Furnished in the Transportation of Their Shipments.

The amending of section 15 in 1906 to empower the Commission to determine reasonable allowances to be paid to shippers for services rendered or instrumentalities

furnished in the transportation of the owner's property was at the direct behest of the Commission made in its annual report for 1905. The Commission said that there was no doubt that the payment of extravagant sums for such services was resorted to for the purpose and with the effect of preferring one shipper to another. It also said that this remedy would not be altogether adequate, and that any remedy was extremely difficult of application, but that nothing better appeared to be available.

In the administration of this power the Commission has adhered to the rule that the shipper may not claim nor receive allowance for any service or instrumentality furnished by it that it could not, in its contractual relationship with the carrier, call upon the railroad company to do for it.

M. I. Gump vs. B. & O. R. R. Co., 14 I. C. C. Rep. 98.

A carrier is not warranted under section 15 of the Act in making an allowance to one shipper who provides a facility and performs a service in the transportation of his own property, while refusing a similar allowance to another shipper competing in the same markets, and in the same line of business, who provides a similar facility and performs the same service in the transportation of his property.

Fed. Sugar Refg. Co. vs. B. & O. R. R. Co., 20 I. C. C. Rep. 200. (See also same case in 17 I. C. C. Rep. 40.)

So, the Commission will not permit such allowances where they operate to produce undue advantages or discriminations.

This power of the Commission does not extend to contracts made with third parties for such services.

Merchants Cot. Press, etc. vs. I. C. R. R. Co., 17 I. C. C. Rep. 98.

"Lateral allowances," so termed, which were in fact reductions below the published rates, have been condemned as unlawful discrimination against competing shippers who are charged with full tariff rates.

- Rates for Transportation of Anthracite Coal, 35 I. C. C. Rep. 220, 241, 243.
 Rules Governing Transportation of Potatoes, 34 I. C. C. Rep. 255, 256.
 Grain Elevation Allowances at Kansas City, 34 I. C. C. Rep. 442, 447.
 Western Trunk Line Rules, 34 I. C. C. Rep. 554, 578.
 Second Industrial Railways Case, 34 I. C. C. Rep. 596, 603.
 Car Spotting Charges, 34 I. C. C. Rep. 609, 617.
 Best Co. vs. G. N. Ry. Co., 33 I. C. C. Rep. 1, 3.
 A. T. & S. F. Ry. Co. vs. K. C. Stock Yards Co., 33 I. C. C. Rep. 92, 98.
 Inman, Akers & Inman vs. A. C. L. R. R. Co., 32 I. C. C. Rep. 146, 148.
 New York Dock Ry. Co. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 568, 569, 574.
 Colonial Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 562.
 In re Muncie & Western R. R. Co., 30 I. C. C. Rep. 434, 435, 436.
 Dunnage Allowances, 30 I. C. C. Rep. 538, 546.
 Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 101.
 Sterling & Son vs. M. C. R. R. Co., 21 I. C. C. Rep. 451, 454.
 In re Allowances for Transfer of Sugar, 14 I. C. C. Rep. 619, 625, 627.
 General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237, 242.
 Traffic Bureau, Merchants' Exchange vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 317, 330.

See also:

- U. S. vs. L. & P. Ry. Co. (Tap Line Cases), 234 U. S. 1, 58 L. Ed. 1185.
 U. S. vs. Butler County R. R. Co., 234 U. S. 29, 58 L. Ed. 1196.
 I. C. C. vs. A. T. & S. F. Ry. Co. (Los Angeles Switching Case), 234 U. S. 294, 58 L. Ed. 1319.
 U. S. vs. B. & O. R. R. Co., 231 U. S. 274, 58 L. Ed. 218.
 Mitchell Coal Co. vs. P. R. R. Co., 230 U. S. 247, 57 L. Ed. 1472.
 U. S. vs. B. & O. R. R. Co., 225 U. S. 306, 56 L. Ed. 1100.
 I. C. C. vs. Dittenbaugh, 222 U. S. 42, 56 L. Ed. 83.
 U. P. R. R. Co. vs. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171.
 I. C. C. vs. Stickney, 215 U. S. 98, 54 L. Ed. 112.

So. Ry. Co. vs. St. L. Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004.

C. & A. R. R. Co. vs. U. S., 212 U. S. 563, 53 L. Ed. 653.

Mitchell Coal & Coke Co. vs. P. R. R. Co., 181 Fed. Rep. 403, 410.

Peavey & Co. vs. U. P. R. R. Co., 176 Fed. Rep. 409, 419.

Allowances are frequently made voluntarily by a trunk line for services performed by a shipper for the trunk line; it is not settled law that the Commission can require these allowances to be made by the trunk line any more than it can require the latter to absorb the published rate of a terminal carrier.

Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 101.

§ 9. Nature of Interstate Commerce Commission Under its Enlarged Powers, and the Relation of Section 15 to the Entire Act to Regulate Commerce.

Section 15 is the dominating and controlling expression of the real object and meaning of the Act in its present form. It makes of the Commission what it was undoubtedly intended to be, namely, a special expert body created for the purpose of dealing with the rates and practices of carriers affecting rates, and not a body to take the place of the courts for the redress of alleged wrongs of the character involved in the complaint.

Joynes vs. Penna. R. Co., 17 I. C. C. Rep. 361.

This section is an empowering act in itself so far as the regulation of rates and practices are concerned. It is the section which gives legal poise to the balance of the Act. In its interpretation it must be read in its relation to the other sections of the Act.

Section 1 of the Act to Regulate Commerce provides that it shall be the duty of every common carrier subject

to the provisions of this Act "to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations for the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." The duty under this section is twofold; first, through routes must be established, and second, just and reasonable rates made applicable thereto. The theory of this provision is that carriers should freely interchange freight between their respective lines to the end that interstate commerce may move without interruption or delay. However, the provision in question should not be subject to so narrow a construction, but should be read in connection with the latter portion of section 3, with section 15, and with a regard to the intendment of the Act as a whole and the correction of the evils it has sought to remedy. Section three requires every common carrier subject to the provisions of the Act to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and forbids discrimination in the rates and charges between such connecting lines. This provision broadens section one and makes plain the intent of Congress that every reasonable and proper facility shall be extended equally by a carrier to all of its connections and that no discrimination in its charges shall be made in favor of or against any connecting line. Section 15 then provides that the Commission may establish through routes and joint rates and prescribe the division of such

rates and terms and the conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint rates, and it further provides that this shall apply when one of the carriers is a water line.

Prior to 1910 the Commission's power to establish through routes was limited to instances in which no satisfactory through route existed. The elimination of this limitation placed within the discretion of the Commission the establishment of additional through routes. In the exercise of this discretion the existence of through routes capable of adequately and expeditiously handling all traffic offered is entitled to much consideration, but no longer constitutes a barrier to another through route.

§ 10. Taking Effect and Duration of Commission's Orders.

Under this section as amended the order of the Commission in all cases, except those in which orders for the payment of money are made, takes effect as prescribed in the order but not in less time than thirty days', and shall remain in effect for two years, unless suspended or set aside by the Commission or a court.

An order of the Commission which does not state the duration thereof is nevertheless a valid one and remains in effect for the two year period fixed by the statute.

N. Y. etc., R. R. Co. vs. I. C. C., 168 Fed. Rep. 131.

Even though two years have elapsed since the taking effect of an order of the Commission the courts will pass upon such order, because the orders of the Commission are in a sense continuing and subsequent proceedings by

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way of reparation might be based upon such expired order.

S. P. Term. Co. vs. I. C. C., 219 U. S. 498, 55 L. Ed. 310.

S. P. Co. vs. I. C. C., 219 U. S. 433, 55 L. Ed. 283.

(See 14 I. C. C. Rep. 461, for original order of Commission.)

Arlington Heights Fruit Exchange vs. S. P. Co., 39 I. C. C. Rep. 88, 93.

See also:

I. C. C. Ann. Reps. for 1909, p. 33, and 1910, p. 16, for effect of court's ruling upon expiration of order of Commission.

(1) **Statute of Limitations.** The Interstate Commerce Commission has held that the statute of limitation does not run to defeat claims for reparation if a mere letter is filed with the Commission setting forth nature of claim or claims, and opportunity is afforded defendants to settle claim or claims before formal proceedings are begun.

Gamble-Robinson Commission Company vs. St. L. & S. F. R. R. Company, 19 I. C. C. Rep. 114.

See also:

S. P. Term. Co. vs. I. C. C., 219 U. S. 498, 55 L. Ed. 310.

S. P. Co. vs. I. C. C., 219 U. S. 433, 55 L. Ed. 283.

Richardson vs. McChesney, 218 U. S. 487, 54 L. Ed. 1121.

Jones vs. Montague, 194 U. S. 147, 48 L. Ed. 913.

U. S. vs. Trans.-Mo. Freight Assn., 166 U. S. 290, 308, 41 L. Ed. 1007.

CHAPTER XVIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 16.

- § 1. Statutory Provisions.
- § 2. Amendments to the Section.
 - (1) Amendment of June 29, 1906.
 - (2) Amendment of June 18, 1910.
- § 3. Subjective Analysis of Section 16.
- § 4. Power of Commission to Award Reparation.
- § 5. Award of Reparation May be Made by Commission Before Future Rate is Prescribed.
- § 6. Power of Commission to Award General Damages.
- § 7. Reference Section.
- § 8. Statutory Provisions—16a.
- § 9. Rehearings.

CHAPTER XVIII.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 16.

§ 1. Statutory Provisions.

(Amended March 2, 1889, June 29, 1906, and June 18, 1910.) "That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Award of damages by Commission.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be **prima facie** evidence of the facts therein stated, and except that the petitioner shall not be

To be enforced by courts.

Findings of fact of Commission prima facie evidence in reparation cases.

liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

"Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect."

Petitioner's at-
torney's fees.

Limitation upon
action.

Joint plaintiffs
may sue joint
defendants in
courts on
awards of dam-
ages.

Service of pro-
cess.

Service of order
of Commission.

Commission may
suspend or
modify order.

Carriers, their
agents and em-
ployees, must
comply with
such orders.

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Punishment by forfeiture for refusal to obey order of Commission under section 15.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Forfeiture payable into Treasury and recoverable in civil suit.

"It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Duty of district attorneys to prosecute.

"The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

Costs and expenses to be paid out of appropriation for court expenses.

Commission may employ attorneys.

"If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served,

Commerce Court to enforce orders other than for payment of money.

and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Schedules, contracts, and annual reports filed with Commission are public records, receivable as prima facie evidence. Certified copies or extracts therefrom also prima facie evidence.

"The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals."

§ 2. Amendments to the Section.

The original 16th section of the Act was confined to providing for the enforcement by the courts of the Commission's orders, and declaring the findings of fact by the Commission, which at that time were compulsory in all cases, *prima facie* evidence therein. The saving of the right of trial by jury under the federal constitution was incorporated into the section by the amendment of March 2, 1889. Const. of U. S., 7th Amndt.

(1) **Amendment of June 29, 1906:** By the amendment of 1906 a practically new section was substituted pro-

viding for the filing of a limitation of action in reparation complaints, the enforcement of reparation awards, employment of attorneys whose services were necessary, serving the Commission's orders by mail, penalizing carriers for disobedience to the orders of the Commission, the venue of suits against the Commission and the expedition thereof, and the procedure therein, and the introduction in evidence of schedules, tariffs, and reports filed with the Commission.

(2) **Amendment of June 18, 1910:** Radical changes in the procedure after order of the Commission were embraced in the amendments of 1910. The provisions in this section relating to suits against the Commission were removed, because of the creation and jurisdiction of the Commerce Court. Each carrier was required to constitute an agent at Washington upon whom service of the Commission's orders might be had, instead of service by mail, and the employment of special attorneys by the Commission directly, without the consent of the Attorney General of the United States.

§ 3. Subjective Analysis of Section 16.

The scope of section 16 will be better comprehended by the following analysis of subjects with which it deals:—

- (a) Award of damages by Commission.
- (b) Petition to United States court in case carrier does not comply with order for payment of money.
- (c) Findings of fact of Commission shall be **prima facie** evidence in reparation cases.
- (d) Petitioner not liable for costs in circuit court.
- (e) Allowance of petitioner's attorney's fee.
- (f) Two-year limitation upon action before Commission.

- (g) One-year limitation upon subsequent judicial proceedings.
- (h) Joint plaintiffs may sue joint defendants in courts on awards of damages.
- (i) Services of Process.
- (j) Service of Order of Commission.
- (k) Commission may suspend or modify order.
- (l) Carrier, their agents and employees must comply with such orders.
- (m) Punishment for forfeiture for refusal to obey order of Commission under section 15.
- (n) Forfeiture payable into Treasury of U. S. and recoverable in civil suit.
- (o) Duty of District attorneys to prosecute.
- (p) Costs and expenses to be paid out of appropriation for court expenses.
- (q) Commission may employ counsel.
- (r) Petition to Commerce Court in cases of disobedience to order of Commission other than for payment of money.
- (s) Commerce Court must enforce disobeyed order if regularly made and duly served.
- (t) Rate schedules, contracts, or agreements, and carriers' annual reports filed with Commission and in custody of secretary are public records, receivable in courts and by the Commission as **prima facie** evidence.

The essential purpose of section 16 is the giving effect to and enforcement of the orders of the Interstate Commission, and the review of such orders by courts of competent jurisdiction.

§ 4. Power of Commission to Award Reparation.

The Interstate Commerce Commission occupies a unique position in the co-ordinate relationship of the legislative, judicial and executive functions of the national government. While essentially an administrative body,

it exercises both quasi-judicial and legislative powers. A claim for reparation is a claim for damages. The requirements of the payment of damages to an injured person is a purely judicial function, and the reason that the term quasi-judicial is used in describing the function of the Commission in awarding reparation or damages where unreasonable rates have been exacted from the shipper is because the Commission can exercise but a part of the judicial power to award damages—that is, it may first determine whether the rate charged and collected was unreasonable, and if unreasonable, it may then mathematically determine the difference between the unreasonable rate charged and what the reasonable rate would have been, and then award such difference as the damages of the injured party by way of reparation. There its judicial function ceases, for it can neither render a judgment for such damages nor give to its award any more than the perfunctory effect of a recommendation. Its award does not become a lien upon the carrier's property as a court judgment would. The award of the Commission can only be enforced by a judicial proceeding with full opportunity for a jury trial; else the Act empowering the Commission to ascertain the amount of the damages would be unconstitutional.

The Commission has wisely proceeded in reparation cases upon the principle that awards should not be made in informal proceedings which would not be made upon the same state of facts in a formally contested case. Thus the Commission will not make awards upon stipulations of the parties that a particular rate was unreasonable.

Dayton Chamber of Com. vs. C. M. & St. P. Ry. Co., 16 I. C. C. Rep. 82.

The Supreme Court of the United States in the **Abilene**

Cotton Oil case, *supra*, said, in speaking of the reparation authority of the Commission:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as a result of an enforcement of the order of the Commission to desist from violating the law rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

The right to reparation is not confined to shipments made by parties to any given proceeding, but extends to all shipments moving under the same circumstances and conditions and charged for on the basis found to be unlawful by whomsoever made.

Kindelon, etc. vs. S. P. Co., 17 I. C. C. Rep. 251, 253. Citing *Nicola, etc., Co. vs. L. & N. R. R. Co.*, 14 I. C. C. Rep. 199, 205.

In still another class of cases, the Commission said:

"Where a transportation service has been rendered for which no tariff authority whatever exists and where the shipper has paid the sum claimed by the carrier for that service, the Commission has jurisdiction to inquire what was a reasonable charge for the service and to order the repayment of whatever the carrier has collected over and above such reasonable charge."

Memphis Frt. Bu. vs. K. C. S. Ry. Co., 17 I. C. C. Rep. 90.

There is nothing in the Act to Regulate Commerce from which a presumption of damages can be inferred and it has never been so held.

The wording of the Act is as follows:

"Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act."

As said in *Parsons vs. C. & N. W. Ry. Co.*, 167 U. S., 447, 460, and quoted in *Pa. R. R. Co. vs. International Coal Co.*, 230 U. S. 200, in construing this section:

Before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

And in *Pa. R. R. Co. vs. International Coal Co.*, *supra*, it is said:

"Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government."

"Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain such a recovery before a court of law." *Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co.*, 20 I. C. C. 43, 51.

Mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make out a *prima facie* case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other

words, he must establish the fact of his damage as well as the amount of damages he claims.

In *Pa. R. R. Co. vs. International Coal Co.*, *supra*, it is held that a mere finding of unjust discrimination, without proof of actual loss suffered, is not grounds for an award of damages.

See also:

Mitchell Coal Co. vs. P. R. R. Co., 230 U. S. 247, 57 L. Ed. 1472.

Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S. 304, 57 L. Ed. 1494.

P. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446.

Darnell vs. I. C. C. R. R. Co., 225 U. S. 243, 56 L. Ed. 1072.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553.

Sou. Ry. Co. vs. Tift, 206 U. S. 428, 51 L. Ed. 1124.

Compare:

U. S. vs. Pac. & Arctic R. & N. Co., 228 U. S. 87, 57 L. Ed. 742.

Texas, etc., Ry. Co. vs. Cisco, 204 U. S. 449, 51 L. Ed. 562.

§ 5. Award of Reparation May Be Made by Commission Before Future Rate is Prescribed.

Awarding reparation for the past and fixing rates for the future involves determination by the Commission of matters essentially different. Reparation is in its nature private and the fixing of rates for the future public. In awarding reparation the Commission acts in its quasi-judicial capacity to measure injuries sustained by private shippers. In fixing rates for the future it moves in its quasi-legislative capacity to prevent future injury to the public.

In proving the unreasonableness of a past rate the testimony may also furnish information on which the Commission may fix a reasonable rate for the future, and both

subjects can be and frequently are disposed of by the same order. In the original Act to Regulate Commerce, however, these two matters could not possibly be combined, for while the Commission could order the carrier to desist from charging an unreasonable rate or imposing an unreasonable practice and award damages arising therefrom, it was without power to fix rates for the future. The situation was analogous because if the shipper obtained his order of reparation on account of an unreasonable charge which the Commission ordered the carrier to discontinue, a slightly different but still unreasonable rate might be enforced by the carrier for the future which the shipper would have to pay and again institute proceedings for reparation.

In *Baer Bros. Merc. Co. vs. D. & R. G. R. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, the Supreme Court had these subject matters before it and in the course of its opinion, referring to the separate functions involved in awarding reparation and fixing rates for the future, said:

"This situation was dealt with by the Hepburn Act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. 34 Stat. 589, Sec. 4; 590, Sec. 5. Not only were the two functions separately treated, but an analysis of the Act shows that there is no such necessary connection between them as to make the quasi-judicial order for reparation depend for its validity upon being joined with a quasi-legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to repara-

tion and not to a new rate; or to a new rate and not to reparation. For example,—section 13 permits ‘any mercantile, agricultural or manufacturing society or any body politic or municipal organization to make complaints against the carrier.’ On the application of such bodies, old rates might be declared unjust and new rates established, but, of course, no reparation would be given, for the reason that such complainants were not shippers and, therefore, not entitled to an award of pecuniary damages. cf. *Louisville, etc., R. R. vs. I. C. C.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co. vs. Atchison etc., Ry.*, 20 I. C. C. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future.

“It may, however, be said that even in such a case, the order while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional, and that the absence of a provision for one need not operate to invalidate an order as to the other. This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his

private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the Act and not required by any of its provisions.

"The present case illustrates some of these features. The plaintiff's petition asks for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate and that the established local charge of one of the carriers was just while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided, ought to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility be changed by any subsequent finding as to the rates for the future. The report and order gave the plaintiff no preference over other shippers, since they showed that 15 cents of the rate charged by the Denver and Rio Grande was unrea-

sonable. If such a finding of unreasonableness was not sufficiently general to inure to the benefit of all other shippers, they could, on application, have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past. So far as the future operation of the order was concerned, all shippers were left in the same position, where, from the necessity of the case, the old rate had to be paid until the time had elapsed within which a new and just through rate could be put into effect. But however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the absence of a concurrent provision establishing a rate for the future."

See also:

Robinson vs. B. & O. R. R. C., 222 U. S. 506, 56 L. Ed. 288.
Y. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426,
51 L. Ed. 553.

§ 6. Power of Commission to Award General Damages.

See this volume, Chaps. VII, VIII and IX, "Amplification of section 8," "Amplification of section 9" and "Damages," ante.

§ 7. Reference Section.

The provisions of section 16, largely apply to the practice and procedure before the Interstate Commerce Commission and will be found treated under respective headings in Part IV, "Practice and Procedure Before the Interstate Commerce Commission," post.

§ 8. Statutory Provisions—16a.

(Added June 29, 1906.) "That after a decision, order, or requirement has been made by the Commis-

Commission may
grant rehear-
ings.

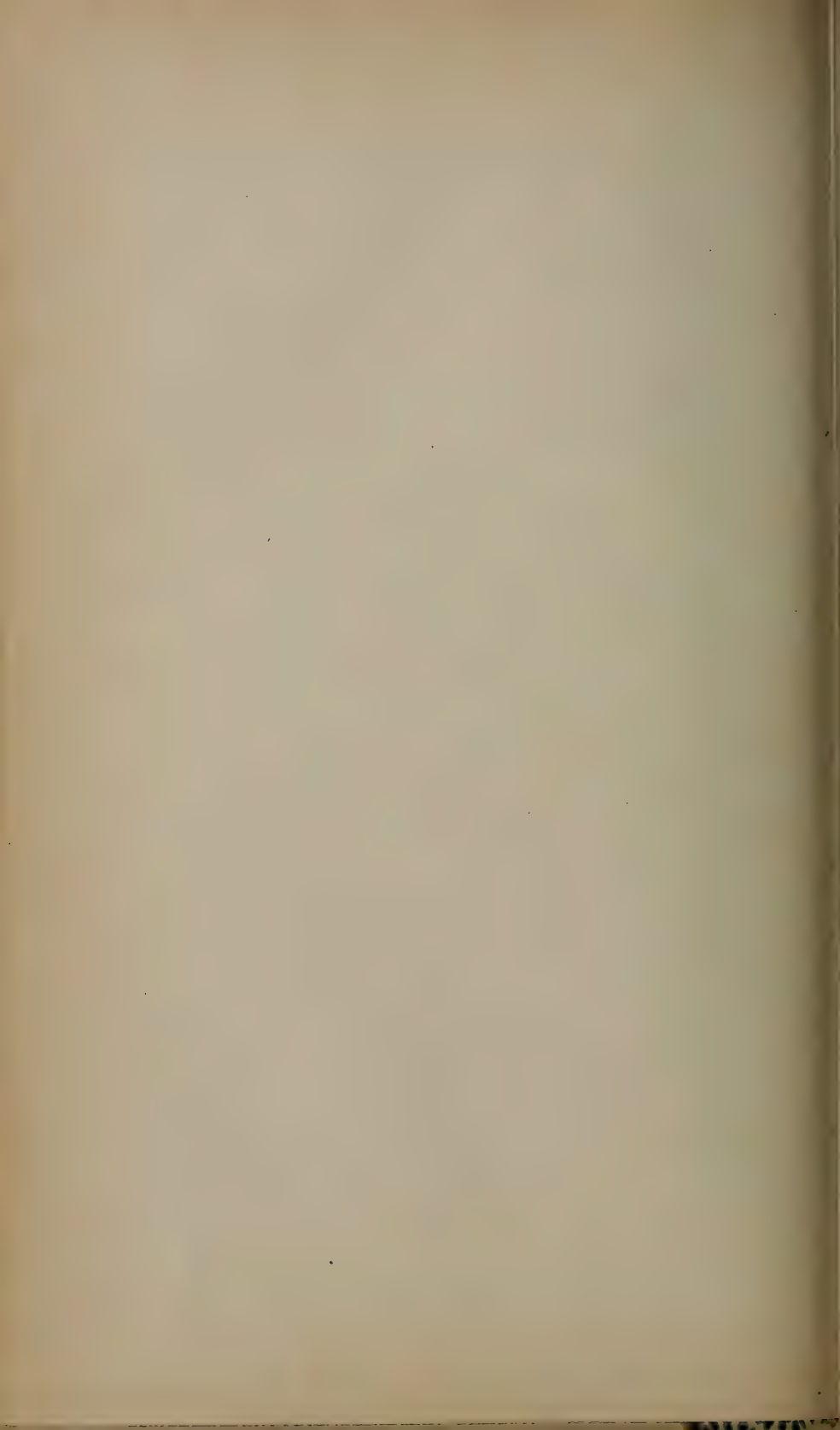
sion in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for hearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

Application for rehearing shall not operate as stay of proceedings, unless so ordered by Commission.

Commission may, on rehearing, reverse, change, or modify order.

§ 9. Rehearings.

See "Interstate Commerce Law," Part IV, "Practice and Procedure Before the Interstate Commerce Commission," post.



CHAPTER XIX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 17, 18, 19 and 19a.

- § 1. Statutory Provisions—Section 17.
- § 2. Amplification of Section.
- § 3. Statutory Provisions—Section 18.
- § 4. Amplification of Section.
- § 5. Statutory Provisions—Section 19.
- § 6. Amplification of Section.
- § 7. Statutory Provisions—Section 19a.
- § 8. Amplification of Section.



CHAPTER XIX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 17, 18, 19 and 19a.

§ 1. Statutory Provisions—Section 17.

(As amended March 2, 1889.) "That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas." ⁽¹⁾

Commission may determine its own procedure.

Parties may appear in person or by attorney.

Official seal.

§ 2. Amplification of Section.

See "Interstate Commerce Law," Part IV, "The Inter-

⁽¹⁾ For amendment of August 6, 1917, providing for the creating of divisions of the Commission, see Appendix, I. C. Law, Part IV.—"Amendatory Acts."

state Commerce Commission" and "Practice and Procedure Before the Interstate Commerce Commission," *post*.

§ 3. Statutory Provisions—Section 18.

(As amended March 2, 1889.) "That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission."⁽¹⁾

§ 4. Amplification of Section.

See "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," *post*.

§ 5. Statutory Provisions—Section 19.

"That the principal official of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay

⁽¹⁾ For amendment of August 6, 1917, repealing provision relating to salary of secretary, see Appendix, I. C. Law, Part IV.—"Amendatory Acts."

Witnesses' fees.

Principal office
at Washington.

Sessions of the
Commission.

or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act."

Commission may prosecute inquiries by one or more of its members in any part of the United States.

§ 6. Amplification of Section.

See "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," post.

§ 7. Statutory Provisions—Section 19a.

"That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

Amendment of March 1, 1913.

Investigation by Commission.

Experts.

Classification and inventory.

"First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and

Cost of property used for common-carrier purposes.

Other property.

an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

"Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stock, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

"Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal govern-

Value of real
property.

Property held for
other than
common-carrier
purposes.

Corporate organ-
ization.

Stocks and
bonds.

Earnings and
expenditures.

Grants from
United States.

ment, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Value of land grants.

Concessions made by carrier.

"Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Method of procedure.

"Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

Prosecution and report of investigation.

"Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require, maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and

Documents to aid investigation.

Access of agents to property.

memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

"Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

"To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

"Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commis-

Effect of rules.

Public inspection
of records.

Valuation of ex-
tensions and
improvements.

Reports Congress.

Information re-
quired of car-
riers.

Notice of com-
pletion of ten-
tative valua-
tion.

sion may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

Finality if no protest filed.

"If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be **prima facie** evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as 'the Act to regulate commerce,' and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Hearings of protests.

Changes.

Effect of final valuation and classification.

"If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the

Effect of evidence.

Transmission to Commission.

Action of Com-
mission.

Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

Modification of
order.

Judgment on
original order.

Applicable to re-
ceivers.

"The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

Penalty.

Jurisdiction of
district courts
to compel com-
pliance.

"That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

Supplemental Act
of August 1,
1914.

"It shall be the duty of every common carrier by railroad whose property is being valued under the Act of March first, nineteen hundred and thirteen, to transport the engineers, field parties, and other employees of the United States who are actually engaged in making surveys and other examination of

the physical property of said carrier necessary to execute said Act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission."

§ 8. Amplification of Section.

See "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," **post**.

See also "Interstate Commerce Law," Part I, Chap. II, Sect. 8, Sub. (11), "Amendment of March 1, 1913."

CHAPTER XX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 20.

- § 1. Statutory Provisions.
- § 2. Amendments to the Section.
- § 3. Subjective Analysis of Section.
- § 4. Reports by Carriers Subject to the Act.
- § 5. Accounting Systems Prescribed by Commission.
- § 6. Limitation of Carriers' Liability.



CHAPTER XX.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTION 20.

§ 1. Statutory Provisions.

(As amended June 29, 1906, February 25, 1909, June 18, 1910, March 4, 1915, and August 9, 1916.)

"That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carrier specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or

Commission may require annual reports and prescribe method of making same.

What reports of carriers shall contain.

Commission may prescribe uniform system of accounts.

contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which accounts shall be kept.

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to require or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or

Annual reports
to be filed
with Commission
by September 30 of
each year.

Commission may
grant additional
time.

Penalty.

Monthly or periodical
reports.

special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

"Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

Recovery of forfeitures.

"The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

Oath to annual reports, how taken.

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

Commission may prescribe forms of accounts, records, and memoranda, and have access thereto.

Carrier to keep no other accounts than those prescribed by Commission.

Commission may employ special examiners to inspect accounts and records.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Punishment of carrier by forfeiture for failure to keep accounts or records as prescribed by Commission or to allow inspection thereof.

Punishment of person for false entry in accounts or records, or mutilation of accounts or records, or for keeping other accounts than those prescribed. Fine or imprisonment or both.

Amendment of February 25, 1909.

Commission may permit destruction of records.

Punishment of special examiner who divulges information without authority. Fine or imprisonment or both.

United States courts may issue mandamus to compel compliance with provisions of Act.

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: **Provided,** That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or violation of any of the provisions of said Act to regulate commerce or of any Act supplementary

thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

"And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Commission may employ special examiners to receive evidence.

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property

Cummins amendment as amended.

Receiving carrier to issue bill of lading.

Liable to holder for any loss.

Not exempted by any contract.

Liability for full actual loss.

caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: **Provided, however,** That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carrier on passenger trains or boats, or boats or trains carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying

Limitations void.

Certain provisions to apply only to ordinary live stock.

Rates dependent upon value.

with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses:

Definition.

Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: **Provided further,** That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: **Provided, however,** That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

Rights under existing law.

Time for filing claims.

Losses by carelessness.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Initial carrier may have recourse upon carrier responsible for loss or damage.

No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven,

Amendment of January 20, 1914.

as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

§ 2. Amendments to the Section.

Section 20 was amended on June 29, 1906, Feb. 25, 1909, June 18, 1910, March 4, 1915, and August 9, 1916.

By the amendment of 1906 the provision for carriers' annual reports was made more specific and forms of accounts, records, and memoranda of the carriers, and prohibition of any other forms of accounts, records or memoranda than those prescribed by the Commission, were made subject to regulation by the Commission.

This same amendment added to the section what was then known as the Carmack amendment providing for the liability of initial carriers. Employment of special agents and examiners, power of inspection and examination of accounts, records and memoranda of carriers, with penalties to enforce the same, and for false entries, together with the right of mandamus in the courts to compel compliance with the provisions of the Act, were also added to the section by the amendment of 1906.

The amendment of 1910 added the provisions for filing of reports by carriers at the end of the calendar year, making more specific the requirement for filing monthly or special reports and providing for authorization of the destruction of books and papers of carriers after a reasonable time.

The amendment of 1915 removed the effect of the Carmack amendment as to liability, and in lieu thereof pro-

hibited any limitation of liability by carriers, except as to goods concealed from view.

The amendment of 1916 revised the proviso in the amendment of 1915 as to goods concealed from view, made the exception more specific and placed the ability of the carrier to fix a reasonable limitation of liability according to gradations of value entirely in the control of the Interstate Commerce Commission.

§ 3. Subjective Analysis of Section.

The scope of the subject-matters of section 20 will be more readily comprehended from the following subjective analysis:

- (a) Common carriers and owners of railroads subject to the Act required to render full annual reports to the Commission.
- (b) Commission may prescribe manner in which reports are to be made, and require specific answers to all questions.
- (c) What the reports shall contain.
- (d) Commission may prescribe uniform system of accounts and manner of keeping accounts.
- (e) Annual Reports to be filed with Commission by September 30th, of each year.
- (f) Commission may grant additional time for filing annual reports.
- (g) Penalty for not filing annual reports.
- (h) Monthly or periodical reports may be required by Commission.
- (i) Oath, and how taken, to annual reports.
- (k) Commission may prescribe forms of accounts, records, and memoranda, and have access thereto.
- (l) Carrier prohibited from keeping any other than accounts prescribed by Commission.
- (m) Commission may employ special examiners to inspect accounts and records.

- (n) Penalty for carrier's failure to keep accounts prescribed by Commission or allow inspection of accounts and records.
- (o) Penalty for punishment of persons for false entry in accounts, or records, or mutilation of accounts or records, or for keeping other accounts or records than those prescribed by the Commission.
- (p) When destruction of papers permissible.
- (q) Punishment of special examiner who divulges facts or information without authority.
- (r) United States courts may issue mandamus to compel compliance with provisions of Act.
- (s) Commission may employ special agents or examiners to administer oaths, examine witnesses and receive evidence.
- (t) Limitations of carriers' liability prohibited.

§ 4. Reports by Carriers Subject to the Act.

Every carrier subject to the Act to Regulate Commerce is required by the provisions of section 20 to make annual report to the Commission, such annual report to contain the statistical information and data designated in the first paragraph of the section. And the right to issue mandamus to compel compliance with the provisions of the Act is conferred upon the circuit and district courts of the United States by the amendatory Act of 1906.

I. C. C. vs. Seaboard Ry. Co., 82 Fed. Rep. 563.

Compare:

Knapp vs. L. S. & M. S. Ry. Co., 197 U. S. 536, 49 L. Ed. 870,
(decision rendered prior to 1906 amendment).

If a carrier does not engage in anywise in interstate transportation, it is not required to make such annual report, but if it engages in interstate transportation by

agreements for through traffic it comes within the requirements of the section.

U. S. *ex rel* vs. K. & S. R. R. Co., 81 Fed. Rep. 783.
I. C. C. vs. Belaire C. & Z. R. Co., 17 Fed. Rep. 942.

The Commission entered orders, pursuant to its authority under section 20, against the Goodrich Transit Company, a water carrier operating on the Great Lakes, and other water carriers, requiring a report of their corporate organizations, financial conditions, etc., from which orders the carriers appealed to the courts. The Supreme Court upheld the authority of the Commission, saying in the course of its opinion:

"The terms of the Act of Congress, as amended June 29, 1906, and in force at the time when these orders were made, are plain and simple, and, we think not difficult to comprehend. * * * The first section makes the Act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the Act in precisely the same terms as those which comprehend the other companies named in the Act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the Act as any other carrier named therein. * * *

"As to annual reports the power conferred in section 20 of the Act, extends to all common carriers subject to the provisions of the Act. The Commission is vested with authority to prescribe the manner

in which such reports shall be made and to require specific answers to all questions as to which the Commission may need information. The report required in these cases was declared to be needed to enable the Commission to procure full information of the scope and character of the business of carriers by water within the jurisdiction of the Commission and of the extent of their operations, such as would enable the Commission to determine the form for annual report which would best give the information required by the Commission, and at the same time conform as nearly as may be to the accounting systems of carriers by water. The form of report adopted by the Commission requires a showing as to the corporate organization of each carrier by water subject to the Act, the companies owned by it and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and securities owned by it, together with all special funds and current assets and liabilities, as well as its funded indebtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind, or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows:—The routes of the carrier and their mileage; a general description of the equipment owned, leased or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported, showing also whether originating on the carrier's line or received from a connecting line; and a general description of any separate business carried on by the

carrier. But such report is no broader than the annual report of such carriers as prescribed by the Act, for section 20 provides that:—

‘Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon, the cost and value of the carriers property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require.’ * * *

“We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of

the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in its accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them. * * *

"The learned Commerce Court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us with great force, that it would be impracticable to make such sepa-

ration in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew and must in the nature of things be under one general bill of expense—at least it would seem impracticable to separate it into its items so as to show the expense of that which it is contended is alone within the terms of the Act, as construed by the carriers.

“We think the Act should be given a practical construction, and one which enables the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in section 1, it is still essential that to enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the Act, it should be informed as to matters contained in the report. Congress, in section 20, has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on with a view to regulating that which is confessedly within its power. * * * Furthermore, it is said that such construction of section 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a Commis-

sion, but having laid down the general rules of action under which a Commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield vs. Stranahan*, 192 U. S. 470, 48 L. Ed. 525, 24 Supt. Ct. 349; *Union Bridge Co. vs. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Supt. Ct. 367; *United States vs. Grimaud*, 220 U. S. 506, 55 L. Ed. 563, 31 Supt. Ct. 480. In section 20 Congress has authorized the Commission to require annual reports. The Act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority. * * *

"As to one of the corporations it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts and whether charges of expense are made

against one part of a business which ought to be made against another. Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority. We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under section 20 of the Act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law.

I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729.

§ 5. Accounting Systems Prescribed by Commission.

The Commission is authorized to require uniform systems of railway accounting and to prohibit other methods of accounting than those which are prescribed by the Commission.

The purpose of the section is very plain that the accounts of all carriers subject to the Act to Regulate Commerce shall be standardized, their accounts arranged under like headings or titles, and charges or credits allocated under proper headings the same with one carrier as with another. The Commission is charged, under the law, with the supervision of rates as to their reasonableness and with the general duty of reporting thereon to Congress, which requires a knowledge of the business of the carrier in all its different essentials, and if the Commission is to successfully perform these duties in respect to reasonable rates, undue discriminations and favoritism and

the business transactions of the carriers, it must be informed as to the business of the carriers by such a system of accounting as will not permit the possible concealment of forbidden practices in secret accounts which the Commission is not permitted to see and concerning which it can acquire no information. The object of requiring the carrier's accounts to be kept in a uniform way and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporation not within its jurisdiction but to inform the Commission concerning the carrier's business methods that it may properly regulate such matters as come really within its jurisdiction.

This part of section 20 has been vigorously assailed by the carriers on several occasions under the charge that the section was unconstitutional because it amounted to unlawful delegation of legislative power to the Commission. The Commission had ordered the Kansas City Southern Ry. Co. to carry part of the expenditure for certain improvements in grades, tracks and terminals for which bonds had been issued, under the heading of "Additions and Betterments" and a portion under the heading of "Operating Expenses." The Supreme Court held that Congress, while it may not delegate legislative power to a Commission, may lay down general rules of action under which a Commission may proceed and may require of that commission the application of such rules to particular situations and investigations of facts with a view to making orders in particular matters within the rules laid down by the Congress.

K. C. S. R. Co. vs. U. S., 231 U. S. 423, 58 L. Ed. 296.
I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729.
U. S. vs. Grimaud, 220 U. S. 506, 55 L. Ed. 563.
Union Bridge Co. vs. U. S., 204 U. S. 364, 51 L. Ed. 523.
Butterfield vs. Stranahan, 192 U. S. 470, 48 L. Ed. 525.

In the **Kansas City Southern case, supra**, the Commission had ordered the Kansas City Southern Ry. Co. to carry part of the expenditure of the proceeds of certain bonds issued for improvement and betterment purposes under the heading of "operating expenses" and the balance under "additions and betterments." The Kansas City Southern attacked the Commission's order in the Commerce Court as being unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of the Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. The Supreme Court in again passing upon the same contention which it had denied in the **Goodrich Transit case, supra**, said:

"The contention of appellant in the Commerce Court and in this court is, that the regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of common carriers, so far as they are here questioned, are unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. It is claimed that the effect of enforcing the regulations under the circumstances of the case is to reduce the amount of net earnings applicable to dividends, and thereby cause an irreparable loss to the preferred stockholders, whose dividends are noncumulative and payable only out of the income of the current year. * * *

"The authority of the Commission rests upon Sec. 20 of the 'Act to Regulate Commerce,' as amended by the Hepburn Act of June 29, 1906. The constitutional validity of this legislation was sustained in *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S. 194, 211, 214, 56 L. Ed. 729, 32 Sup. Ct. 436. * * * * The very object of a system of accounts is

to display the pertinent financial operations of the company, and throw light upon its present condition. If they are to truly do this, the form must correspond with the substance. In order that accounts may be standardized, it is necessary that the accounts of the several carriers shall be arranged under like headings or titles; and it is obviously essential that charges and credits shall be allocated under the proper headings—the same with one carrier as with another. Unless ‘Additions and Betterments,’ on the one hand, and ‘Operating Expenses,’ on the other, are to indicate the same class of entries upon the books of one carrier that they indicate upon the books of other carriers, there is no possibility of standardization. So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission. There is no direct interference with the internal affairs of the corporation; and if any such interference indirectly results, it is only such as is incidental to the lawful control of the carrier by the Federal authority and to this the rights of stockholders and bondholders alike are necessarily subject. * * *

“Congress in authorizing the Commission to prescribe a uniform system of accounts, recognized that accounting systems were not then uniform; and in reiterating this authorization in 1906, and adding a prohibition against the keeping of other accounts than those prescribed, manifested a purpose to standardize and render uniform the accounts of the different carriers with respect to matters that entered into property and the improvements thereof, on the one hand, and the current operations of the company, on the other. By the very terms of section 20, Congress at least outlined the classification of the carriers’ accounts, for it required the annual reports to show ‘the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same * * * the sur-

plus fund, if any, * * * the funded and floating debts * * * the cost and value of the carrier's property, franchises and equipments; * * * the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet.' By the same section the Commission was authorized to require these annual reports from all carriers subject to the Act, and to prescribe the manner in which the reports should be made, and for this and other purposes to require carriers to have 'as near as may be, a uniform system of accounts, and (to prescribe) the manner in which such accounts shall be kept.'

"Plainly the law-making body recognized the essential distinctions between property accounts and operating accounts, between capital and earnings; it recognized that the practice of different carriers varied in respect to these matters; and that no system of supervision and regulation would be complete without requiring the accounts of all the carriers to speak a common language. There is here no unconstitutional delegation of legislative powers. The reasoning adopted in *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S. 194, 210, etc., 56 L. Ed. 729, 32 Sup. Ct. 436 is controlling. And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations. It is contended that the regulations of the Commission, in respect to the matters now under consideration, are so

unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred by section 20, and consequently that they ought to be set aside by judicial action. This is not on the ground that the Commission did not proceed with due deliberation and after proper inquiry. * * *

"Since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the Interstate Commerce Commission of the supervisory and regulatory powers conferred upon it by Congress. Appellant contends, *inter alia*, that since the original locations were necessary in the development of its railroad line and were abandoned only as an incident to the improvement and development of the property, the cost thereof, being as it is termed a part of the 'cost of progress,' should remain in the property account, as representing a part of the stockholder's present investment. * * *

"And since one of the manifest objects of Congress in authorizing the supervision and standardization of carriers' accounts as is done in section 20 of the Interstate Commerce Act, was to enable the commissioners to intelligently perform their duties respecting the regulation of carriers' rates for the services performed, and since it is settled that the property investment which is to be taken into consideration as one of the elements in fixing such rates is the property then in use (*Smyth vs. Ames*, 169 U. S. 466, 546, 42 L. Ed. 819, 18 Sup. Ct. 418; *San Diego Land and Town Co. vs. National City*, 174 U. S. 739, 757, 43 L. Ed. 1154, 19 Sup. Ct. 804; *San Diego Land and Town Co. vs. Jasper*, 189 U. S. 439, 442, 47 L. Ed. 892, 23 Sup. Ct. 571; *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 41, 53 L. Ed. 382, 29 Sup. Ct. 192; *Minn. Rate Cases*, 230 U.

S. 352, 434, 458, 57 L. Ed. 1511, 33 Sup. Ct. 729), it is obvious that so far as the regulations of the Commission now under consideration discard the 'cost of progress' theory they need no further vindication. * * *

"The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done but only to systematize their accounts with respect to whatever is done. It is to be presumed that boards of directors will select that method of accomplishing a needed grade revision that shall be preferable from the engineering standpoint and suited to the financial condition and prospects of the company; not that they will adopt an inferior or more costly method of improvement because of the accounting requirements. * * * It is said that the effect of the regulations, if complied with, is to deprive the preferred stockholders of a considerable part of the noncumulative dividends from the net earnings of the company, to which they would otherwise be entitled. The preferred stockholders, as such, are not before the court, and this is not a proper occasion for determining their rights. Supposing, however, that the enforcement of the accounting system does require them to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property. Assuming (as of course we must) that the management of the company has acted prudently in making these extensive improvements within a short time, instead of distributing them throughout a series of years, and without providing in advance any fund applicable to them, still it must be presumed that the improvements are necessary to the general welfare of the company, and will result in its increased prosperity, and therefore make better the assurance of dividends for the preferred stockholders in the future. But, aside from that, the Interstate Commerce Act deals with the carrier in its capacity as a servant of the public, and as a distinct entity, amenable to the legitimate regulation of Congress and the Commission. If in this aspect the car-

rier is not unwarrantably injured or deprived of its property by the exercise of the regulatory powers, the operation of such regulations cannot be restrained on the ground of agreements made by the stockholders amongst themselves for apportioning profits to one or the other class of stockholders. To admit this might materially hamper the Federal control over interstate carriers and evidently would tend to render impracticable the standardization of methods of accounting.

* * * But did we agree with appellant that the abandonments ought to be charged to surplus or to profit or loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."

See also the opinion of the Supreme Court in **Goodrich Transit Company case**, *supra*, this volume, Chap. XX, Sec. 4, "Reports by Carriers Subject to the Act," *ante*.

Section 20 gives the Commission the right, through its examiners and other proper agents, to inspect any and all accounts, records, and memoranda kept by carriers subject to the Act, but this authority does not include the right to examine the correspondence of the carriers. This power in the Commission is in aid of its authority to prescribe and establish a uniform system of accounting and bookkeeping for carriers subject to the Act and to inspect the same. This right of examination of accounts, records and memoranda kept by carriers is not limited to such as have been made since the 1906 amendment (which took effect August 29, 1906), but extends to pre-existing records.

U. S. vs. L. & N. R. Co., 236 U. S. 318.

§ 6. Limitation of Carriers' Liability.

From the very origin of railway transportation in this country common carriers by railroad have sought, by pro-

visions in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as **tort-feasors** for loss or damage caused by their negligence. One method was by a so-called release executed by shipper and carrier, and intended to be effective whether the loss or damage was due to negligence of the carrier or to other causes. The courts in different jurisdictions have differed as to the validity of such limitations and they have been the subject of legislation in some of the states.

By adoption of the "Carmack amendment," so called, to the Act to Regulate Commerce, approved June 29, 1906, the Congress provided that a common carrier receiving property for transportation from a point in one state to a point in another state should issue a receipt or bill of lading therefor and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, or over whose lines such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. It was provided that nothing in that amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had at that time under existing law.

Since that time, beginning in 1913, with **Adams Express Co. vs. Croninger**, 226 U. S. 491, the Supreme Court of the United States has decided in a number of cases, all of which followed **Hart vs. P. R. R.**, 112 U. S. 331, that where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability, and in "a fair, just and reasonable agreement" declares or agrees that the value of his shipment is a certain sum and thereby secures a reduced trans-

portation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss of or damage to the property, and conclusively presumed to have known the governing tariff.

In re The Cummins Amendment, 33 I. C. C. Rep. 682, 683.

On March 4, 1915, the first Cummins Amendment was approved by Congress and took effect June 2, 1915. Many widely varying and diametrically opposed ideas were expressed as to the effect of the amendment and the possibility of all railroad transportation freight rates in the country becoming automatically advanced ten per cent on the date the Cummins amendment took effect. The Interstate Commerce Commission was importuned to interpret the amendment and give expression to its requirements and the Commission subsequently held a hearing on the subject.

The first Cummins amendment made it unlawful for the carrier to fix a period for giving notice of claims shorter than 90 days, for the filing of claims shorter than four months, and for the institution of suits shorter than two years. It did not indicate the time or date from which these several periods of time should be computed; that is, whether from the date of delivery by the carrier of the damaged property, or in case of loss, after a reasonable time for delivery had elapsed from the date shown on the bill of lading, or from the occurrence of the loss or of the damage, thus leaving it to the carriers to determine what periods of time they would fix for the giving of notice of claims, the filing of claims, and the institution of suits.

In answering the inquiry, whether, if no changes were made in the then existing shipping contracts and rate schedules, the higher rates provided therein would auto-

matically become lawfully applicable upon the date which the amendment would take effect, the Commission said:

"As we have seen, the Carmack amendment, adopted in 1906, provided that no contract, receipt, rule, or regulation should exempt the carrier from the liability thereby imposed. As has been said, no effort was made to change rates because of that amendment to the act. The classifications or rate schedules provide that unless the terms of certain bills of lading are accepted higher rates will apply. The terms of the bill of lading could be modified or changed to any extent without automatically changing any rate. Prior to 1913 many of the limitations contained in bills of lading or other shipping contracts were treated as if they did not exist, and it was never suggested that the validity or invalidity of any such provision affected the rate.

"It is contrary to all canons of construction to hold that an act of Congress produces a result not intended by Congress unless the express language of the act compels such a construction. There is nothing in the express terms of this act or in the history of this legislation that shows any intent or purpose on the part of Congress to affect in any degree the existing rates charged by carriers for transporting property. The legislation is aimed at specified contracts and declares them to be unlawful. The lawful rates on file at this time, therefore, are the rates providing for the limited liability. The Cummins amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10 per cent increased rates are merely additional and can not stand in and of themselves.

"Applying correct rules of interpretation, the Cummins amendment does not automatically bring into effect the increased rates named in the classifications and tariff publications as applicable to shipments

which are not made subject to the terms of the uniform or carrier's bill of lading."

In re The Cummins Amendment, 33 I. C. C. Rep. 682, 692.

The first Cummins amendment clearly placed upon the carriers liability for the full actual loss, damage, or injury to the property transported, caused by such carriers and made unlawful any limitation of that liability or of the amount of recovery thereunder in any receipt, bill of lading, contract, rule, regulation, or tariff, filed with the Commission. The amendment, however, did not stop with this, for in a proviso it was provided:

"That if a commodity in the course of transportation is hidden from view by wrapping, boxing, or other means, so that the carrier can not know its character, that is to say, its grade, quality, and condition, it may, with the approval of the Commission, publish and maintain rates based on value and require the shipper to state in writing the value of any shipment made, and beyond the value so stated the carrier shall not be liable."

This proviso was severely attacked as an abnoxious legal innuendo having a subtle tendency to vary the prohibition of the amendment as to live stock shipments. It is clear that when the first Cummins amendment went into effect a carrier could no longer contract to limit its liability for loss or damage caused by it to the property received for transportation, but there was no inhibition as to the limitation of the carrier's liability for losses not caused by it or by a succeeding carrier to which the property might be delivered. In this respect the Cummins amendment of 1915 expressly reapplied the limitation of the prior act with respect to loss or damage caused by carriers. It therefore followed that the interpretation applied to the act before it was amended was equally applicable to the 1915 amendment in so far as the latter affects the right of a carrier to estab-

lish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. So the Commission held that under the 1915 amendment a contract or a tariff might lawfully limit to a reasonable maximum the liability of a carrier for losses which it did not cause, and that the rates provided by such tariff might be proportionate to the risk assumed. The Commission then proceeded to hold that the proviso of the statute as to goods concealed from view and of the character of which the carrier is not advised clearly prescribes the right of carriers under the direction or approval of the Commission to provide for a graduation of rates in accordance with the declared value of the property transported. The liability provided by the rates so established by the Commission would be applicable no less to instances of loss or damage chargeable to the negligence of the carrier than to those occasioned by causes beyond the carrier's control. In other words, the carriers could not contract to limit their liability for loss, damage, or injury caused by them to property, the character of which was manifested by the shipment itself or otherwise disclosed.

The Commission called attention to the fact that the carriers were not prohibited by the amendment from making different rates dependent upon the value of different grades of a given commodity; that, except as covered by the Cummins amendment, including approval of the rates by the Commission, the carrier is subject to all of the liabilities imposed by that amendment and that if in any instance the shipper declared the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violated, and was subject to the penalty prescribed in, section 10 of the Act to Regulate Commerce and that the carrier would also be subject to the same penalty in such a case if, having knowl-

edge that the value represented was not the true value, it nevertheless accepted the shipper's representation as to value for the purpose of applying the rate.

In re Cummins Amendment, 33 I. C. C. Rep. 682, 694.

See also:

Iowa R. R. Commissioners vs. A. T. & S. F. Ry. Co., 36 I. C. C. Rep. 79, holding that the Cummins amendment of 1915 had in effect abolished in interstate commerce the entire system of released rates based on agreed valuations as distinguished from actual value, and applying the principles enunciated in **The Cummins Amendment**, 33 I. C. C. Rep. 682.

In 1906 section 20 had been amended by the so-called Carmack amendment which made the initial carrier receiving property for interstate transportation liable to the lawful holder of a receipt or bill of lading issued therefor on account of any loss, damage, or injury to such property caused by it or any other common carrier over whose lines the same might pass. Prior to that time the situation had been obnoxious to the shippers because the shipper or consignee was put to the trouble and expense of attempting to locate among those carriers composing the through line of movement of the shipment the particular carrier responsible for any loss or damage occurring to the shipment, and of endeavoring to collect from it. The difficulties confronting such a course of action by the shipper are too manifest to need repetition here. The Carmack amendment did not undertake directly to prescribe or limit the conditions or provisions of the bill of lading, but operated to render void to the extent stated any attempt at limitation of the liability of the initial carrier to the shipper. The initial carrier becomes liable not only for the negligent acts and omissions of its employees but for those of connecting carriers resulting from the failure of the final carrier to notify the consignee of the arrival of the goods at destination, and

for its failure on the consignee's refusal to accept them, to store the goods for the account of the shipper or to exercise proper care in holding them for him. Prior to 1913 the limited liability provisions contained in the shipping contracts, classifications, and rate schedules were very generally disregarded in the settlement of loss or damage claims, especially by western carriers. It became the practice for carriers to incorporate into their schedules, particularly their classifications, the forms of bills of lading and other shipping contracts in use on their various lines, and in 1913 the Supreme Court in the case of **Adams Express Co. vs. Croninger**, 226 U. S. 491, following the early rule laid down in **Hart vs. P. R. R.**, 112 U. S. 331, held that the provisions of the transportation contracts and rate schedules in so far as they limited carriers' liability should be recognized as lawfully binding upon carriers and shippers alike. The practice of the carriers which had been theretofore to state the limitations of liability in such contracts and schedules, but to settle claims generally upon the basis of full value, was thereupon changed and the policy was generally adopted of endeavoring to enforce the limited liability provisos.

The so-called uniform bill of lading, which has long been in use in official and western classification territories, contains, and has contained, a provision that claims for loss or damage must be presented to the carrier within four months, but until the **Croninger case**, *supra*, was decided by the Supreme Court no effort was made by the carriers generally to enforce or to observe that provision. After the **Croninger case** was decided the carriers adopted an entirely different course and took the position that this provision was in the bill of lading, the terms of the bill of lading were in the rate schedules, and therefore it was unlawful to depart from that requirement. This created a gen-

eral controversy, and the sudden change from ignoring a rule to literally enforcing it necessarily created multitudes of unjust discriminations. The question was presented to and considered by the Commission, and as the fair and only means of composing the situation and avoiding endless controversy and litigation, the Commission issued its report, **In the Matter of Bills of Lading**, 29 I. C. C. 417, holding that the Commission had no authority to order carriers to disregard their tariffs, nor did it feel justified in acquiescing in the adjustment of matters brought into the condition presented at the hearing by reason of the disregard of tariff provisions, except from the necessity of the situation to require carriers to deal with all claims upon their merits, in good faith, and without discrimination as to the rule regarding the period of time within which the claims had been presented.

So much dissatisfaction resulted from the proviso of the Cummins amendment of 1915 as to goods concealed from view, and the Commission's interpretation thereof, that Congress on August 9, 1916, approved a reamendment of the section, striking out such proviso and substituting in lieu thereof the following proviso:

"Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by

the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to Regulate Commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

It is clearly the purpose of the Cummins amendment, as amended, of August 9, 1916, to invalidate all limitations of liability for loss, damage, or injury to ordinary live stock caused by the initial carrier or by another carrier to which shipment may be delivered or which may participate in transporting it, notwithstanding any representation or agreement or release as to value. Ordinary live stock is excepted from the property as to which the Commission is empowered to authorize or require the establishment of rates dependent upon declared or released value. If rates on ordinary live stock dependent upon declared value could lawfully be maintained without authorization by the Commission, there might and probably would be instances in which conflict would arise as between the liability imposed by the act upon the carrier and the prohibitions of Section 10 of the act affecting shippers. The Commission, in view

of the provisions of the law, cannot authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission. Under such authority both shipper and carrier are fully protected and the full spirit of the law is observed.

For many years, if not from the origin of the express business, the principal express companies maintained rates, dependent upon the value of the property as declared by the shipper, or as agreed upon for the purpose of determining the rate to be applied, by which declaration or agreement the shipper was bound. He was stopped from recovering more than that value in case of loss of or damage to the property in *Adams Express Co. vs. Croninger*, 226 U. S. 491.

Following the report of the Commission of May 7, 1915, *In re Cummins Amendment*, 33 I. C. C. 682, and responsive to supplemental order No. 13 in Docket No. 4198, the various express companies amended certain of their classification rules, also the uniform express receipt, effective June 2, 1915, to provide for the application of rates dependent upon the actual value of the property transported.

Thereafter, the express companies petitioned the Commission for an order authorizing the maintenance of express rates dependent upon the value of the property as declared in writing by the shipper or as agreed upon in writing, and submitted for approval proposed classification rules and form of express receipt, embracing changes that such an order would require.

The Commission authorized the express companies to establish upon not less than 10 days' notice to the Interstate Commerce Commission and the general public, by filing and posting in the manner prescribed in Section 6 of

the act to regulate commerce, the following classifications rules, to-wit:

"Rates named in tariff governed by this classification, except as to ordinary live stock, are dependent upon and vary with a declared or released value of the property. * * *"

Also, authorized express companies upon like notice, to amend the form and terms and conditions of the uniform express receipt so that they would read as follows:

"The Company will not pay over \$50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.
* * *"

The Commission further ordered that express classification rules filed under authority of this order shall show in connection therewith the following notations:

"Issued under authority of the Interstate Commerce Commission's supplemental order No. 18 of April 2, 1917, in case No. 4198."

In closing its supplemental report the Commission said:

"It is clearly the purpose of the Cummins amendment, as amended, to invalidate all limitations of liability for loss, damage, or injury to ordinary live stock caused by the initial carrier or by another carrier to which shipment may be delivered or which may participate in transporting it, notwithstanding any representation or agreement or release as to value. While it does not appear to be the purpose of petitioners to attempt a limitation of liability, a continuance of the present method of stating rates for ordinary live stock would require a representation of the value, which is declared to be unlawful.

"The act, as amended, fixes upon the carrier liability for the full actual loss, damage, or injury caused by it

to ordinary live stock and invalidates any limitation or attempted limitation of that liability, wherever or in whatever form it is found. Ordinary live stock is excepted from the property as to which we are empowered to authorize or require the establishment of rates dependent upon declared or released value. If rates on ordinary live stock dependent upon declared value could lawfully be maintained without authorization by the Commission, there might and probably would be instances in which conflict would arise as between the liability imposed by the act upon the carrier and the prohibitions of section 10 of the act affecting shippers. We can not, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission. Under such authority both shipper and carrier are fully protected and the full spirit of the law is observed.

"The shipper or lawful holder of the receipt or bill of lading for ordinary live stock should be free to press his claim for recovery in full for loss, damage, or injury caused by the carrier, and rates for the transportation of such live stock may not be stated in a manner to require a representation of the value. This is not saying that value may not be considered and duly weighed as an element in determining what reasonable rates shall be established.

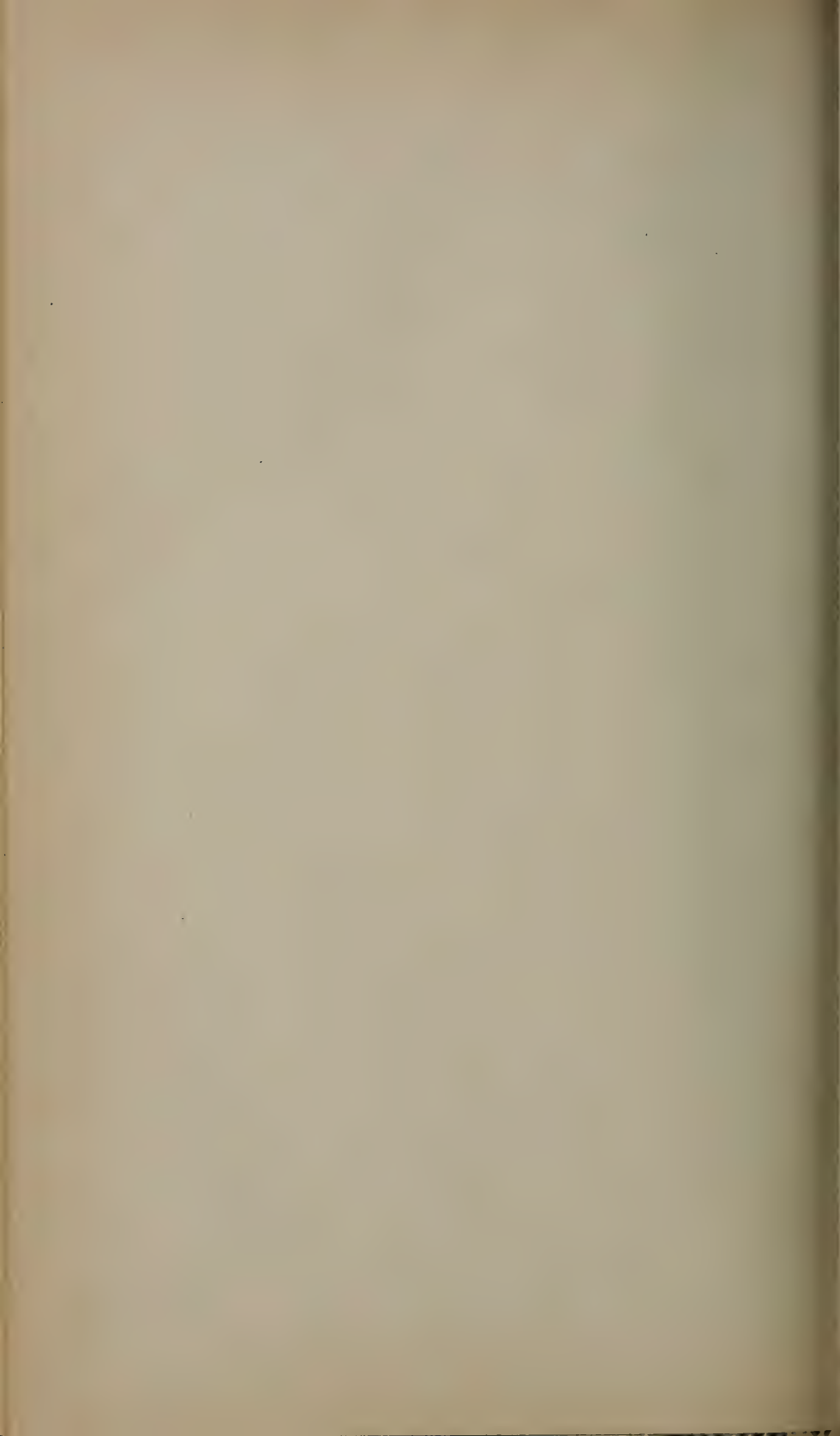
"As to live stock the order herein will apply only to that which is chiefly valuable for breeding, racing, show purposes, or other special uses.

"An order will be entered authorizing the maintenance of existing express rates dependent upon the declared or released value of the property transported, except ordinary live stock, also authorizing the form of express receipt to be used."

It will be noted that the Cummins Amendment of 1916 places the right of the carrier to establish reasonable lim-

itation of its liability under the conditions as set forth in the amended proviso entirely in the control of the Interstate Commerce Commission while the several other provisions of the Cummins Amendment of 1915 stand as they did before the enactment of the amendment of 1916.

The general subject of limitation of common carrier's liability is treated in a subsequent volume of the library devoted to "The Law of Common Carriers."



CHAPTER XXI.

ACT TO REGULATE COMMERCE AS AMENDED. (Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 21, 22, 23 and 24.

- § 1. Statutory Provisions—Section 21.
- § 2. Amplification of Section.
- § 3. Statutory Provisions—Section 22.
- § 4. Amplification of Section.
- § 5. Statutory Provisions—Section 23.
- § 6. Amplification of Section.
- § 7. Statutory Provisions—Section 24.
- § 8. Amplification of Section.

CHAPTER XXI.

(Continued.)

Amplification of Sections (Continued).

AMPLIFICATION OF SECTIONS 21, 22, 23 and 24.

§ 1. Statutory Provisions—Section 21.

(As amended March 2, 1889.) "That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission."

Annual reports
of the Commission
to Congress.

§ 2. Amplification of Section.

See "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," post.

§ 3. Statutory Provisions—Section 22.

(As amended March 2, 1889, and February 8, 1895.) "That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary

Persons and
property that
may be carried
free or at re-
duced rates.

Mileage, excursion, or commutation passenger tickets.

Passes and free transportation to officers and employees of railroad companies.

Provisions of Act are in addition to remedies existing at common law. Pending litigation not affected by Act.

Joint interchangeable five-thousand-mile tickets. Amount of free baggage.

Rates to be published, filed, and observed.

agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: **Provided**, That no pending litigation shall in any way be affected by this Act: **Provided further**, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Com-

merce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso."

Penalties.

§ 4. Amplification of Section.

Section 22 of the Act as amended is illustrative, rather than exclusive, and must be read in its relation to the prohibition against free transportation contained in section 1 of the Act. The amendment to the section of March 2, 1889, specifically provided that the amended section should in no wise operate to abridge or alter any existing remedies, either at common law or by statute, "but the provisions of this Act are in addition to such remedies." The further amendment of February 8, 1895, permitted the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

The section is in reality illustrative in that it defines that excepted classes of persons in favor of whom certain discriminations should not be deemed unjust. Indeed, many, if not all, of the excepted classes named in the section, are those, if the section did not exist, not necessarily subjects of unjust discrimination if more favorable terms were extended to them than to ordinary passengers.

In the **Party Rate case**, 145 U. S. 263, it was held that the naming of certain discriminations which should not be deemed unjust did not prevent discriminations in favor of others under circumstances and conditions so substantially alike as to justify the same treatment. In other words, the section was not exclusive, but merely illustrative of certain definite forms of permissive discriminations.

The section has always been construed as permissive with respect to the issuance of mileage, excursion, or commutation passenger tickets, and were as authorizing the Commission to compel the issuance of such tickets. The Commission has held that the use of mileage books is merely a privilege accorded by carriers voluntarily, and that purchasers take them subject to all lawful and nondiscriminatory conditions attached to them. There is not discrimination in issuing such tickets on one occasion and not issuing them on another. The objective of the section and of the entire Act is that when they are issued however, whatever the occasion, they must be offered impartially to all who accept the conditions attached to them, and the rates at which such tickets are sold must conform with the rates and fares on file with the Commission. The intention of Congress is simply that the issuance of such tickets shall be unrestricted.

Since the carriers may, in their discretion, issue such tickets, it is equally a matter within their discretion when they withdraw them, subject, of course, to nondiscriminatory conditions in the withdrawal.

§ 5. Statutory Provisions—Section 23.

(Added March 2, 1889.) "That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which

United States
courts to com-
mand move-
ment of inter-
state traffic or
the furnishing
of cars or
other transpor-
tation facili-
ties.

this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: **Provided**, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: **Provided**, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement."

Remedy is cumulative.

§ 6. Amplification of Section.

See "Interstate Commerce Law," Part IV, "Practice and Procedure Before the Interstate Commerce Commission," *post*.

§ 7. Statutory Provisions—Section 24.⁽¹⁾

See "Interstate Commerce Law," Part IV, "The Interstate Commerce Commission," *post*.

§ 8. Amplification of Section.

See Part IV, "The Interstate Commerce Commission," *post*.

⁽¹⁾ For amendment of August 6, 1917, enlarging the membership of the Commission to nine commissioners, see Appendix, I. C. Law, Part IV—"Amendatory Acts."

CHAPTER XXII.

ACT TO REGULATE COMMERCE AS AMENDED.

(Concluded.)

Amplification of Sections (Concluded).

§ 1. Additional Provisions to the Act to Regulate Commerce.

CHAPTER XXII.

ACT TO REGULATE COMMERCE AS AMENDED.

(Concluded)

Amplification of Sections (Concluded).

§ 1. Additional Provisions to the Act to Regulate Commerce.

(Additional provisions in Act of June 29, 1906.)
(Sec. 9.) "That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act."

Existing laws as to attendance of witnesses and production of evidence applicable to proceedings under this Act.

(Sec. 10.) "That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Conflicting laws repealed.

Amendments not to affect pending causes in court.

(Sec. 11.) "That this Act shall take effect and be in force from and after its passage.

When Act effective.

"Joint resolution of June 30, 1906, provides: 'That the Act entitled "An Act to amend an Act entitled 'An Act to regulate Commerce,' approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," shall take effect and be in force sixty days after its approval by the President of the United States.'"

Time of taking effect extended 60 days (August 23, 1906).

(Additional provisions in Act of June 18, 1910.)
(Sec. 6, par. 2.) "It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington.

Common carrier designate agent in Washington for purposes of service.

District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission."

Service on such
agents.

Pending cases.

(Sec. 15.) "That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation, or association."

Existing liabilities.

When Act effective
(August 17, 1910).

(Sec. 18.) "That this Act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately."

Public, No. 41, approved February 4, 1887, as amended by Public, No. 125, approved March 2, 1889; Public No. 72, approved February 10, 1891; Public, No. 38, approved February 8, 1895; Public, No. 337, approved

June 29, 1906; Public Res., No. 47, approved June 30, 1906; Public, No. 95, approved April 13, 1908; Public, No. 262, approved February 25, 1909; Public, No. 218, approved June 18, 1910; Public, No. 337, approved August 24, 1912; Public, No. 400, approved March 1, 1913; Public No. 48, approved January 20, 1914; and Public No. 161, approved August 1, 1914.

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